No. 05-975

In The

Supreme Court of the United States

FREDERICK J. BRUSH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Sixth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

FREDERICK J. BRUSH, #17333-075
United States Penitentiary McCreary
P.O. Box 3000
Pine Knot, Kentucky 42635-3000
(606) 354-6000

QUESTIONS PRESENTED

1) WHETHER THE PETITIONER SHOULD HAVE BEEN ISSUED A CERTIFICATE OF APPEALABILITY (COA) BY EITHER THE MIDDLE DISTRICT COURT OF TENNESSEE OR THE SIXTH CIRCUIT COURT OF APPEALS?

2) WHETHER THE PETITIONER WAS CONVICTED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?

3) WHETHER PETITIONER WAS CONVICTED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE SIXTH AMENDMENT AND DUE PROCESS OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

LIST OF PARTIES

ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE COVER PAGE

FREDERICK J. BRUSH – Petitioner

UNITED STATES OF AMERICA – Respondent

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was: February 28, 2005 and appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

REASONS FOR GRANTING THE WRIT

Petitioner Frederick J. Brush stands unconstitutionally convicted of the charge of one count of 18 U.S.C. Section 2252(a)(2)(A) Receipt of Child Pornography and further contends that the petition should be granted for the following reasons:

1.) To preserve and protect the constitutional rights of this Petitioner and any others similarity situated.

2.) To provide firm and unwavering guidance to the lower courts in regard to the insurance of Certificate of Appealability (COA) which is in conflict with this court as found in *Miller-El v. Cockrill*, 537 U.S. 322, 324, 123 S.Ct. 1029 (U.S. 2003).

3.) The decision of the U.S. District Court for the Middle District of Tennessee is in conflict with 18 U.S.C. Section 3282 and the decisions of other Federal Courts regarding what constitutes a violation of "due process" in both the Fifth and Sixth Amendments of the U.S. Constitution. 18 U.S.C. Section 3282, *Mann v. United States*, 304 F.2d 394, and *Hedgepeth v. United States*, 364 F.2d 684 (C.A. D.C. 1966).

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PETITIONER SHOULD HAVE BEEN ISSUED A CERTIFICATE OF APPEALABILITY (COA) BY THE SIXTH CIRCUIT COURT OF APPEALS. *MILLER-EL V. COCKRILL*, 123 S.CT. 1029, 537 U.S. 322, 324 (U.S. 2003)

A conflict exists between the strict interpretation of *Miller-El v. Cockrill*, 123 S.Ct. 1029, 537 U.S. 322 (U.S. 2003) by the Sixth Circuit Appellate Court which denied Petitioner's Motion to Issue Certificate of Appealability (COA) and the more liberal guidelines held by this Court.

Following the sentencing in the United States Court for the Middle of Tennessee by Judge Todd J. Campbell on February 10, 2003, Petitioner filed a pro-se Motion to Vacate, Set Aside and Correct Sentence by a person in Federal Custody (28 U.S.C. Section 2255) into the United States District Court on February 9, 2004.

On June 17, 2004 the United States District Court for the Middle of Tennessee, Judge Todd J. Campbell sua sponte denied this motion to Vacate, Set Aside and Correct Sentence by a Person in Federal Custody. Petitioner then filed a motion to Reconsider on June 27, 2004. Motion to Reconsider was denied by Judge Campbell who also stated an application to issue a Certificate of Appealability (COA) would also be denied.

A proper and timely application for a Certificate of Appealability in accordance with 28 U.S.C. Section 2253 was filed to the Sixth Circuit Court of Appeals on September 2, 2004. The Sixth Circuit Court of Appeals denied the Motion to issue a (COA) on February 28, 2005.

The Petitioner contends the Sixth Circuit Court of Appeals should have issued the COA in accordance with the proper reading of *Miller-El v. Cockrill*, 123 S.Ct. 1029, 537 U.S. 322, that reasonable jurists could have debated whether there was a valid denial of Petitioner's Constitutional rights guaranteed under the Fifth and Sixth Amendments.

When a habeas applicant seeks a COA, the court of appeals should limit its examination to a *threshold inquiry* into the underlying merits of his claims. The inquiry *does not* require the full consideration of the factual or the legal basis supporting the claims. Consent with the courts and the statutory text, the person need only demonstrate "a substantial showing of a denial of a constitutional right." The Petitioner more than satisfied this standard when he provided convincing argument that his constitutional right to a Speedy Trial, guaranteed by the Sixth Amendment, was violated. (*See* Appendix J). By satisfying this standard, [of demonstrating a substantial showing of a denial

of a constitutional right], Petitioner has demonstrated that jurist of reason could disagree with the Circuit Courts resolution of this case and that the issues presented were adequate to deserve encouragement to proceed further. "He need not convince a judge or for that matter, three judges, that he will prevail, but must demonstrate that reasonable, [537 U.S. 324] jurists would find the District Court's assessment of the Constitutional claims debatable or wrong." 537 U.S. 324.

PRAYER FOR RELIEF

WHEREFORE, based on the above facts and prior guidance from this Court, Petitioner prays his petition for a Writ of Certiorari will be granted.

WHETHER THE PETITIONER WAS CONVICTED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?

A conflict exists between Petitioner's preindictment delay complaint as adjudicated by the Middle Tennessee District Court and the decisions of other lower courts on the same issue.

The due process clause of the Fifth Amendment to the Constitution of the United States protects the accused against a purposeful, unreasonable oppressive or unexplained delay regarding the stale return of an indictment.

BACKGROUND

On August 12, 1998, the Petitioner was arrested and his computer with hard drive, and numerous other miscellaneous items were seized and held as evidence by the T.B.I. Shortly after Petitioner's arrest he was advised by retained counsel that the Federal government was also interested in the Petitioner's case due to information they had recovered from the computer/harddrive. Upon advice of counsel, Petitioner pleaded "no contest" to state charges of aggravated sexual battery and was sentenced to eight years in state prison. (*See* Appendix H). Three and a half years (42) months after the Petitioner's arrest, the Federal government, buoyed by a nationwide federal pornography sting, dubbed *Candyman*, a Federal indictment was returned on February 7, 2002, charging Petitioner with possession of a computer which contained child pornography (*see* Appendix J). Petitioner was sentenced more than a year later on February 10, 2003 on one (1) count of possession of pornography. (*See* Appendix B).

PETITIONER'S CLAIM

The return of Petitioner's Federal Indictment 42 months after the offense date with absolutely no justification and no valid reason for the delay offered by the government, was a clear violation of Petitioner's Fifth Amendment "Due Process Rights" as guaranteed by the United States Constitution. It was obvious to Petitioner that the government had *intentionally* delayed the formal charge waiting for an opportunity to gain a tactical advantage over the Petitioner. This window of opportunity availed itself early in 2002 when the Federal Government initiated a nationwide Federal Pornography Sting dubbed

Candyman and merely attached Petitioner's case to it as a matter of convenience.

FACTS OF CASE

The Petitioner was charged with unlawful possession of a computer and associated harddrive which contained child pornography in violation of Title 18, U.S.C. Section 2252A(a)(2)(A). This is not a c mplicated or involved accusation; either the Petitioner possessed a computer which contained child pornography on or about the day alleged or he did not. The government required no long period of time to produce evidence and make certain that it had a case against the Petitioner. An indictment could have been returned forthwith, and an arrest made promptly. The government made no showing on the record that it required three and a half years (42 months) in which to determine whether or not to indict and subsequently arrest the Petitioner. (*See* Appendix P; page 2).

The governments response to motion to vacate, set aside and corrected a sentence by a person in Federal Custody (*see* Appendix M), contained an affidavit from Petitioner's attorney, who stated "I do not know what caused the delay in prosecution by the Federal authorities; however, I do know that Ms. Wendy Goggins was later transferred to the Department of Justice and AUSA Byron Jones was assigned the case." It reasonably can be inferred that *the prosecutor was merely busy with other matters that he considered more important than this case or was deliberate in delay in order to gain a tactical advantage over the Petitioner* as it actually occurred when the government eventually attached charges *as a matter of convenience* to a nationwide federal pornography sting,

dubbed *Candyman*. Pre-indictment delay, intentionally brought about by prosecution to obtain *tactical advantage over defendant*, may warrant dismissal of indictment, especially where governmental offered *no valid reason for delay*, violating defendant's Fifth Amendment **due process rights**. *United States v. Brown*, 959 F.2d 63 (C.A. 6 Tenn. 1992).

Also, it has been noted that a showing of **prejudice** is *not* required in asserting the violation of a constitutional right. *United States v. Lustman*, 258 F.2d 475, 477-478, 358 U.S. 880, 79 S.Ct. 118, 3 L.Ed.2d 109 (1958). Additionally, it has been proposed that after a *lengthy delay* one may assume **prejudice**, *e.g.*, *Hedgepeth v. United States*, 364 F.2d 684, 687, 124 U.S. App. D.C. 291 (1966); *Taylor v. United States*, 238 F.2d 259, 262, 99 U.S. App. D.C. 183 (1956); *Petition of Provoo*, 17 F.R.D. 183, 203 (D. Md.), *aff'd mem.*, 76 S.Ct. 101, 100 L.Ed. 761 (1955).

Although it has not been directly decided, "**due process**" may be denied when a formal charge is delayed for an *unreasonable*, *oppressive* and *unjustifiable time* after the offense to the prejudice of the accused. *Nickens v. United States*, 323 F.2d 808, 810 n.2 (1963).

PRAYER FOR RELIEF

In summary, based upon the argument and case law provided, the Petitioner prays that this court will concur in the above findings that the Government (1) returned an overly stale indictment of 42 months after offense (2) there was no valid reason for the delay other than to gain a tactical advantage over the Petitioner and (3) that the formal charge was delayed for an unreasonable, oppressive

and unjustifiable time after the offense to the prejudice of the Petitioner.

WHEREFORE, based on the above facts, the United States Supreme Court and lower court case law and all attached supporting documents, the Petitioner respectfully requests this Court to (1) affirm Petitioner's due process rights, as guaranteed by the Fifth Amendment of the United States Constitution, were violated; (2) grant the Writ of Certiorari; (3) Vacate the Judgment; (4) Dismiss the Indictment and all related matters. In summary, based upon the argument and case law provided, the Petitioner prays that this court will concur in the above findings that the government (1) returned an overly state indictment of 42 months after offense; (2) there was no valid reason for the delay other than to gain a tactical advantage over the Petitioner, and (3) that the formal charge was delayed for an unreasonable, oppressive and unjustifiable time after the offense to the prejudice of the Petitioner.

3. WHETHER THE PETITIONER HAS BEEN DENIED HIS RIGHT TO A SPEEDY TRIAL AS PROTECTED BY THE SIXTH AMENDMENT AND DUE PROCESS OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A Conflict exists between Petitioner's Speedy Trial rights as adjudicated by the Middle Tennessee District Court and decisions of other lower courts on the same issue.

The speedy trial clause of the Sixth Amendment guarantees the accused the

> "Right to a Speedy Trial, which is not a theoretical or abstract right, but one rooted in hard reality or need to have charges promptly exposed. If case for prosecution calls on accused to meet charges rather than rest on infirmities of prosecution's case, as is the defendant's right, the time to met them is when the case is fresh. Stale claims are not favored by the law and far less so in criminal cases. U.S.C. Constitution Amendment VI.

Overview

On August 12, 1998 Petitioner was arrested on state charges of aggravated sexual battery. (*See* attached Judgment of the Circuit Court of Stewart County, TN, Appendix H). A variety of personal property was later seized which included a computer and associated hard drive. Special Agent Joe Craig of the Tennessee Bureau of Investigation (TBI) was present at Petitioner's arrest at the Stewart County Sheriff's office in Dover, TN, substantiating the federal government's knowledge and interest in this matter from inception. The indictment of Petitioner filed February 7, 2002, count (two) (*see* Appendix J), the government actually *predates* day of arrest (8-12-1998) by stating the crime took place between August 4th, 1998 and August 6th 1998. It wasn't until February 7, 2002, forty-two (42) months after Petitioner's arrest, that the government found it convenient to merely hitch his case along with others charged to a nationwide Federal pornography sting. (*See* attached Federal Indictment No. 3:02-0002, filed February 7, 2002, Appendix J). Once indicted, the government took *over a year* before Petitioner was finally sentenced on February 10, 2003, concluding an *oppressive, purposeful* and *unexplained delay* of *four and a half years*

or *fifty-four months* from date of offense to sentencing (*see* attached judgment of the District Court, Case No. 3:02-0002, filed on February 10, 2003, Appendix B).

After sentencing, the Petitioner properly filed a motion under 28 U.S.C. Section 2255 [brought by a state prisoner] on February 9, 2004 to Vacate, Set Aside or correct a sentence by a Person in Federal custody (*see* Appendix I) and on May 12, 2004 the Petitioner filed a motion to Dismiss an Indictment by a Person in Federal Custody (*see* Appendix P). Judge Todd J. Campbell, subsequently denied both motions (*see* Appendix O & R). In regard to the Petitioner's claim of denial of right to a speedy trial (*see* Appendix P) the lower courts and even this Court have rendered varied opinions on whether the pre-indictment period may be used to trigger a Speedy Trial violation.

In *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455 (U.S. Dist. Col. 1971), Mr. Justice White writing for the majority held that the Sixth Amendment guarantee of speedy trial is applicable only after a person has been "accused" of a crime. However, in this same case, Mr. Justice Douglas filed an opinion concurring in the result in which Mr. Justice Brennan joined, stating he *disagreed* with the court that the guarantee [Speedy Trial] does not apply if the delay was at the pre-indictment stage of the case.

> "Our decisions do not support the limitations of the right to a speedy trial adopted in the majority conclusion that the Sixth Amendment does not extend to the period prior to "arrest." *United States v. Marion*, 92 S.Ct. 455, 404 U.S. 307.

Justice Douglas further stated . . .

> [In *Miranda v. Arizona*] we held, that it was necessary in the police to advise of the right to counsel in the pre-indictment situation where a person has been taken into custody or otherwise deprived of his freedom of action in any *significant way*. That case (*Miranda v. Arizona*, 86 S.Ct. 1602, 1612, 384 U.S. 936, 444 16 L.Ed.2d 604 (1966)) like the present one, *United States v. Marion* dealt with one of the rights enumerated in the Sixth Amendment to which an "accused" is entitled. We were not then concerned with whether an "arrest" or an indictment was necessary for a person to be an "accused" and thus entitled to Sixth Amendment protections. We should follow the same approach here and hold that the right to a speedy trial is denied if there were years of unexplained and inexcusable pre-indictment delay. *United States v. Marion*, 92 S.Ct. 455, 404 U.S. 307, 16 L.Ed.2d 694 (1966).

FACTS OF CASE

The facts of Petitioner's case are straight forward and uncomplicated are not complicated at best; only required a minimum of investigation by the government. Petitioner's arrest on August 12, 1998 and the seizure of a computer harddrive. [the *only* evidence the government used to convict] started the clock tolling to ascertain the substance and validity of any future delays in this case. To this end, the period from arrest (or date of offense) to the date the indictment was issued by the government on February 7, 2002 the period was three and a half years or 42 months from indictment to the date Petitioner was sentenced on February 10, 2003 was in excess of one (1) year. **The total**

delay from offense to sentencing was four and a half years or fifty-four (54) months. These unexplained delays by the government were deliberate, oppressive and presumptively prejudicial.

SPEEDY TRIAL LAW

In order to validate a speedy trial claim this court has accepted an approach called a "balancing test" in which the conduct of *both* the prosecution and the defendant are weighed, *Barber v. Wingson*, 407 U.S. 514, 92 S.Ct. 2182 (U.S. Ky. 1972). The Petitioner submitted the near perfect results of this test as it regarded Petitioner's case (*see* Appendix P, pg. 2-3) to validate his claim of speedy trial violation to the District Court. Judge Campbell ruled Petitioner's motion was without merit, stating the pre-indictment delay should have been argued as a Fifth Amendment violation. Contrasting opinion is found in numerous cases from this court (*Dickey v. Florida*, 398 U.S. 30, 90 S.Ct. 1564 (1970) and *Pollard v. United States*, 352 U.S. 351, 77 S.Ct. 485 (1957) and *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455 (1971)) that the delay need only be found purposeful or oppressive to be in violation of the Sixth Amendment.

PRE-INDICTMENT DELAY

Regarding pre-indictment delay in the Sixth Circuit (*United States v. Rogers*, 118 F.3d 466 (C.A. 6 Ky. 1977), the court stated "to prove unconstitutional pre-indictment delay, the defendant must first *prove* "substantial prejudice" to his right to a fair trial." *United States v. Brown*, 959 F.2d 63. In *Mann v. United States*, 304 F.2d 394 (C.A. D.C. 1962) and contrary to opinions in *Foley v. United*

States, 287 F.2d 562 (8th Cir. 1961); *Venus v. United States*, 287 F.2d 304 (9th Cir. 1960), the constitutional guarantee protects against undue delays in presenting the formal charge as well as delays between indictment and trial. This Court's affirmance of Judge Thomsen's ruling in *Provoo, infra*, seems to have settled the point. We accept appellant's premise that the constitutional right to a speedy trial is properly enforced by dismissal of the charge when there has been prejudicial delay in bringing this case to trial. *United States v. Provoo*, 350 U.S. 857, [113 U.S. App. D.C. 30], 76 S.Ct. 101, 100 L.Ed. 761, *also affirming Provoo. Also affirming Petition of Provoo*, D. Md., 17 F.R.D., 183 are: *Taylor v. United States*, 99 U.S. App. D.C. 83, 238 F.2d 259; *United States v. McWilliams*, 82 U.S. App. D.C. 259, 163 F.2d 695 (1947).

WHEN IS GOVERNMENTAL DELAY REASONABLE?

Clearly a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is purposeful or oppressive, is unjustifiable *Pollard v. United States, supra*, 352 U.S. at 351, 77 S.Ct. at 485. *See also United States v. Provoo, supra*. The same may be true of *any* governmental delay that is *unnecessary*, whether intentional or negligent in origin. Thus, the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided and whether it was unnecessary. Consider on one hand (1) the reason for the delay and (2) the length of the delay and its potential for prejudice to interests protected by the speedy-trial safeguard.

WHAT IS THE ROLE OF PREJUDICE IN SPEEDY TRIAL DETERMINATIONS?

The following courts are divided in their conclusions regarding prejudice. One court has stated that "we think that a showing of (398 U.S. 53) prejudice is *not* required when a criminal defendant is asserting a constitutional right under the Sixth Amendment." *United States v. Lustman*, 258 F.2d 475-478 (C.A. 2nd Cir. 1958). Some have held that prejudice may be assumed after lengthy delays, *e.g.*, *Hedgepeth v. United States*, 124 U.S. App. D.C. 291, 294, and n.3 364 F.2d 684, 687 and n.2 (1966). Others have insisted that its existence be shown by the defendant, *e.g.*, *United States v. Jackson*, 369 F.2d 936, 939 (C.A. 4th Cir. 1966), though some courts have shifted the burden of proof to the government after a long delay, *e.g.*, *Williams v. United States*, 102 U.S. App. D.C. 51, 250 F.2d 19, 21-22 (C.A. D.C. Cir. 1957).

Despite the difficulties of proving or disproving actual harm in most cases, it seems that inherent in prosecutorial delay is "potential substantial prejudice" *United States v. Wade*, 388 U.S. 218, 227, 87 S.Ct. 1926, 1932, 18 L.Ed.2d 1149 (1967) to the interests protected by the Speedy Trial Clause. *The speedy-trial safeguard is promised upon the reality that fundamental unfairness is likely in overdue prosecutions.* The Supreme Court used in *United States v. Ewell*, 383 U.S. 20, 86 S.Ct. 776 (1966), that the guarantee of a Speedy Trial is an important safeguard to limit the possibilities that long delay will impair the ability of the accused to defend himself. Judge Frankel of the District Court for the Southern District of New York has stated that "prejudice may fairly be presumed simply because everyone knows that memories fade, evidence is lost and the burden of anxiety upon any

criminal defendant increases with the passing months and years." *United States v. Mann*, 291 F.Supp. 268, 271 (1968). When the Sixth Amendment right to a Speedy Trial is at stake, it may be realistic and necessary to *assume prejudice* once the accused shows that he was denied a rapid *prosecution*.

The Petitioner asserts to this Court that the Government substantially and deliberately and without any justification in the record delayed the prosecution beyond a point at which a probability of prejudice arose and that the government might early have avoided it.

The Petitioner asserts that the speedy trial guarantee attaches as soon as the government decided to prosecute and had sufficient evidence for arrest or indictment (In Petitioner's case this date was August 12, 1998); that the governmental delay for 54 months that might reasonably have been avoided was deliberate, oppressive and unjustifiable and that prejudice ceases to be an issue in this speedy trial case since the delay has been sufficiently long to raise a *probability of substantial prejudice*.

PRAYER FOR RELIEF

In summary, based upon the argument and case law provided above, the Petitioner prays that this Court will concur in the above findings that this was a simple case; the government did not offer any explanation in the record for the delay; the delay was deliberate, presumptively, prejudicial and oppressive – all elements which established a gross violation of the Speedy Trial Clause of the Sixth Amendment of the United States Constitution.

WHEREFORE, based on the above facts, Supreme Court and lower court case law and all attached supporting

documents, the Petitioner respectfully request this Court (1) Affirm Petitioners "Speedy Trial" rights, as guaranteed by the Sixth Amendment of the United States Constitution were violated, (2) Grant the Writ of Certiorari, (3) Vacate the judgment, and (4) Dismiss the indictment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FREDERICK J. BRUSH, #17333-075
United States Penitentiary
McCreary
P.O. Box 3000
Pine Knot, Kentucky 42635-3000
(606) 354-6000

APPENDIX A

Nos. 04-5909/6003

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FREDERICK JAMES BRUSH, Petitioner-Appellant,	)	
v.	)	ORDER
UNITED STATES OF AMERICA, Respondent-Appellee.	)	(Filed Feb. 28, 2005)

Frederick James Brush, a federal prisoner proceeding pro se, appeals the district court's orders: (1) denying his motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255; (2) denying his motions for reconsideration; and (3) denying him a certificate of appealability. Brush filed a "motion to issue a certificate of appealability" in No. 04-5909; his filing of a notice of appeal in No. 04-6003 has been construed as an application for a certificate of appealability. Fed. R. App. P. 22(b).

To obtain a certificate of appealability, an applicant must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Upon review, the court concludes that Brush has failed to make a showing that reasonable jurists could

disagree with the district court's resolution of his claims. Accordingly, his applications for certificates of appealability are denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green [illegible]
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT

MIDDLE District of TENNESSEE

UNITED STATES OF AMERICA

V.

FREDERICK JAMES BRUSH

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:02-00022

Ernest Williams
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) Two (2) of Indictment

___pleaded nolo contendere to count(s) _____ which was accepted by the court.

___was found guilty on count(s) _____ after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	**Nature of Offense**	**Date Offense Concluded**	**Count Number(s)**
18 U.S.C. § 2252A(a)(2)(A)	Receipt of Child Pornography	August 12, 1998	Two (2)

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___The defendant has been found not guilty on count(s) _____

X Count(s) One (1) is dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstance.

Defendant's Soc. Sec. No.: 569-54-9934

Defendant's Date of Birth: December 5, 1940

Defendant's USM No.: 17333-075

Defendant's Address: Custody

February 7, 2003
Date of Imposition of Judgment

/s/ Todd Campbell
Signature of Judicial Officer

Todd J. Campbell, U.S. District Judge
Name and Title of Judicial Officer

February 7, 2003
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of seventy-one (71) months.

X The court makes the following recommendations to the Bureau of Prisons:

1. Mental health treatment for sex offenders.

X The defendant is remanded to the custody of the United States Marshal.

___The defendant shall surrender to the United States marshal for this district:

__ at _____ __a.m. __ p.m. on _____.

__as notified by the United States Marshal.

___The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

__before 2 p.m. on _____

__as notified by the United States Marshal.

__as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
By DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term five (5) years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

___ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

_X_ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payment set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The Defendant is prohibited from owning, carrying or possessing firearms, destructive devices or other dangerous weapons.

2. The Defendant shall cooperate in the collection of DNA as directed by the probation officer.

3. The Defendant shall participate in sex offender treatment as directed by the probation officer and submit to assessment including physiological testing which may include polygraph examinations, psychological/psychological evaluations, and other assessment as deemed appropriate by the treatment provider. The Defendant shall pay cost of treatment, unless financially unable.

4. The Defendant shall reside in a residence approved, in advance, by the probation officer. Any changes in residence must be pre-approved by the probation officer. The Defendant shall not reside in any location where a computer is present.

5. The Defendant shall register with sex offender registration agencies in any state in which the Defendant lives, is a student, or is employed or carries on a vocation for a period exceeding 14 days or for an aggregated period time exceeding 30 days during any calendar year. Registration must be accomplished within 72 hours of commencement of supervision and verification provided to the probation officer.

6. The Defendant shall not possess or use a computer with access to the Internet or other on-line computer service at any location (including place of employment). This includes any Internet Service provider, bulletin board [illegible] or any other public or private network or e-mail system.

7. The Defendant shall not associate with children under the age of 18 under any circumstances. The Defendant shall not loiter near schools, playgrounds, swimming pools, sports fields, or other places frequented by children.

8. The Defendant shall provide the probation officer access to any requested financial information.

9. The Defendant shall not possess any materials depicting sexually explicit conduct, as defined in 18 U.S.C. § 2256(2), involving adults or children.

10. The defendant shall not enter or otherwise patronize any sexually oriented business.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on the attached page.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00

___The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO245C) will be entered after such determination.

___The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

___If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	***Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order or Percentage of Payment**
TOTALS	$_____	$_____	

___If applicable, restitution amount ordered pursuant to plea agreement $ _____

___The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

___ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

___ the interest requirement is waived for the ___ fine and/or

___ restitution. ___ the interest requirement for the ___ fine and/or ___ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ___ Lump sum payment of $ _____ due immediately, balance due

___ not later than _____ , or

___ in accordance with___ C, ___ D or, ___ E below; or

B _X_ Payment to begin immediately (may be combined with ___ C, ___ D or, ___ E below); or

C ___ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ___ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ___ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a

period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, U.S. District Court, 801 Broadway, 8th Floor, Nashville, Tennessee 37203.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

___Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

___The defendant shall pay the cost of prosecution.

___The defendant shall pay the following court cost(s):

___The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including the cost of prosecution and court costs.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREDERICK JAMES BRUSH	)	
	)	
V.	)	No. 3:04-0141
	)	JUDGE CAMPBELL
UNITED STATES OF AMERICA	)	
	)	

ORDER

The Court is in receipt of a pro se prisoner motion under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence.

As it is not readily apparent from the face of the motion that the movant is not now entitled to relief from this Court, Rule 4(b), Rules – Section 2255 Cases, the United States Attorney for this judicial district shall file an answer, plead or otherwise respond to the motion in conformance with Rule 5, Rules – Section 2255 Cases, within twenty-three (23) days of the date of entry of this Order on the docket.

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREDERICK JAMES BRUSH	)	
	)	
v.	)	No. 3:04-0141
	)	JUDGE CAMPBELL
UNITED STATES OF AMERICA	)	
	)	

ORDER

Pending before the Court are a Motion To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody (Docket No. 1), and a Motion To Dismiss Indictment By A Person In Federal Custody (Docket No. 10), both filed by the Movant/Petitioner, *pro se* (hereinafter "Petitioner"). The Government has filed a response to the Motion To Vacate (Docket No. 6), and the Petitioner has filed a reply brief (Docket No. 9).

The Court has reviewed the pleadings and briefs filed by both parties, the record of Petitioner's underlying conviction, and the entire record in this case. For the reasons set forth in the accompanying Memorandum, the Court concludes that the Motion To Vacate is without merit, and is DENIED. Petitioner's Motion To Dismiss Indictment is also DENIED.

Should the Petitioner give timely notice of an appeal from this Memorandum and Order, such notice shall be treated as a application for a certificate of appealability, 28 U.S.C. 2253(c), which will not issue because the Petitioner has failed to make a substantial showing of the denial of a

constitutional right. *Castro v. United States*, 310 F.3d 900 (6th Cir. 2002).

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES-
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREDERICK JAMES BRUSH	)	
	)	
v.	)	No. 3:04-0141
	)	JUDGE CAMPBELL
UNITED STATES OF AMERICA	)	
	)	

MEMORANDUM

I. Introduction

Pending before the Court are a Motion To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody (Docket No. 1), and a Motion To Dismiss Indictment By A Person In Federal Custody (Docket No. 10), both filed by the Movant/Petitioner, *pro se* (hereinafter "Petitioner"). The Government has filed a response to the Motion To Vacate (Docket No. 6), and the Petitioner has filed a reply brief (Docket No. 9).

The Court has reviewed the pleadings and briefs filed by both parties, the record of Petitioner's underlying conviction, and the entire record in this case. For the reasons set forth below, the Court concludes that the

Motion To Vacate is without merit, and is DENIED. Petitioner's Motion To Dismiss Indictment is also DENIED.

II. Procedural and Factual Background

The Indictment in this case charged Petitioner with possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2 (Count One), and receipt of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and 2 (Count Two). (Docket No. 1 in Case No. 3:02-00022).

Petitioner's counsel, Ernest W. Williams, filed a Motion To Suppress on the Petitioner's behalf objecting to the search of his residence on the grounds that the affidavit in support of the search warrant did not establish probable cause because it was based on the statements of a three year-old child, and because no time frame for the alleged crimes was stated in the affidavit, (Docket Nos. 16, 17, 22, 23 in Case No. 3:02-00022). On the date the pending motions were to be heard, Petitioner offered, and the Court accepted, his plea of guilty to Count Two of the Indictment. (Docket Nos. 34, 46 in Case No. 3:02-00022).

Petitioner was subsequently sentenced to seventy-one months to run consecutive to a sentence already imposed in state court for aggravated sexual battery. (Docket No. 47 in Case No. 3:02-00022).

III. Analysis

A. The Petitioner's Claims

Petitioner argues in his Motion To Vacate that his conviction was obtained through an unconstitutional search, and that he received ineffective assistance of

counsel. (Docket No. 1). In the Motion To Dismiss, Petitioner argues that he was denied his right to a speedy trial during the proceedings leading to his conviction. (Docket No. 10).

B. The Section 2255 Remedy/Evidentiary Hearing Not Required.

Section 2255 provides federal prisoners with a statutory mechanism by which to seek to have their sentence vacated, set aside or corrected.[1] The statute does not provide a remedy, however, for every error that may have been made in the proceedings leading to conviction. The statute contemplates constitutional errors, and violations of federal law when the error qualifies as a "fundamental defect which inherently results in a complete miscarriage of justice." *Reed v. Faley*, 512 U.S. 339, 114 S.Ct. 2291, 2296, 2299-2300, 129 L.Ed.2d 277 (1994); *Grant v. United States*, 72 F.3d 503, 505-06 (6th Cir. 1996).

Rule 4(b) of the Rules Governing Section 2255 Proceedings provides that the Court shall consider the "files, records, transcripts, and correspondence relating to the judgment under attack" in ruling on a petition or motion filed under Section 2255.

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[1] 28 U.S.C. § 2255 states, in part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

An evidentiary hearing is not required if the record conclusively shows that the Petitioner is entitled to no relief 28 U.S.C. § 2255; Rule 8 of the Rules Governing Section 2255 Proceedings For The United States District Courts; *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999). Nor is a hearing required "if the petitioner's allegations 'cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Id.* (quoting *Engelen v. United States*, 68 F.3d 238, 240 (8th Cir. 1995)).

The Court has reviewed the record filed in the proceeding underlying Petitioner's conviction, as well as the pleadings, briefs, and records filed by the parties in this case. The Court finds it unnecessary to hold an evidentiary hearing in this case because these records conclusively establish that Petitioner is not entitled to relief.

C. Unconstitutional Search

Petitioner argues that both his federal and state convictions were based on an invalid search warrant. Petitioner appears to argue that the information contained in the affidavit offered in support of the search warrant was unreliable.

In state court, the Petitioner pled *nolo contendere* in Stewart County Circuit Court to one count of aggravated sexual battery, but explicitly reserved the right to challenge the admissibility of evidence seized pursuant to a search of his residence. *State v. Brush*, 2000 WL 378315, at *1 (Tenn. Crim. App. April 14, 2000). On appeal of this certified question, the Tennessee Court of Criminal Appeals determined that it was without jurisdiction under the state rule governing certified questions of law because

the search issue was not dispositive of the case. *Id.*, at *2. The search issue was not dispositive, according to the court, because even if the evidence seized in the search had been excluded, the testimony of the victim and her mother was still available to establish the Petitioner's guilt. *Id.*

In reaching its conclusion, the court addressed, in a footnote, Petitioner's argument that the search warrant affidavit lacked probable cause because it did not establish the reliability of the three year-old victim/informant:

> . . . Although we find the presented questions non-dispositive we would note that this court has on previous occasion addressed the issue of a child informant, concluding that a child informant be evaluated as a citizen informant. *See State V. Tina M. Yeomans and David McCluster Wade, Jr.*, No. 02C01-9810-CC-00312 (Tenn. Crim. App. at Jackson, Oct. 25, 1999)(*for publication*). In so concluding, Judge Riley, writing on behalf of this court, held that, although 'the age of the informant is certainly relevant, the mere fact that the citizen was a juvenile . . . does not preclude a fording of reliability.' *State v. Tina M. Yeomans and David McCluster Wade, Jr.*, No. 02C01-9810-CC-00312 (citing *Easton v. City of Boulder*, 776 F.2d 1441, 1450 (10th Cir. 1985) (permissible to rely upon statements of five year old and three year old children in issuing arrest warrant)).
>
> Additionally, the court acknowledged that, even where evidence is not 'legally competent in a criminal trial,' that same evidence may be used to establish probable cause. *State v. Tina M. Yeomans*

> *and David McCluster Wade, Jr.*, No. 02CO2-9810-CC-00312 (citing *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741 (1965)).

Id., at *2, n. 4.

Unlike the state proceedings, the suppression issue was not reserved during the guilty plea proceedings in this Court. A defendant who pleads guilty generally waives any non-jurisdictional claim, including a Fourth Amendment claim, that arose before the plea "unless he has preserved the right to do so by entering a conditional plea of guilty in compliance with Rule 11(a)(2) [of the Federal Rules of Criminal Procedure]." *United States v. Bell*, 350 F.3d 534, 535 (6th Cir. 2003). *See also Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *United States v. Cottage*, 307 F.3d 494, 499 (6th Cir. 2002); *United States v. Martinez-Orozco*, 52 Fed.Appx. 790, 792, 2002 WL 31780986 (6th Cir. 2002). As Petitioner did not expressly preserve the Fourth Amendment issue, he waived that claim by entering into an unconditional plea of guilty in the underlying criminal proceedings.

In any event, Petitioner has cited no authority indicating that the age of the victim informant is dispositive in determining whether probable cause exists for the issuance of a search warrant. *See, e.g., Easton v. City of Boulder*, 776 F.2d 1441, 1449-51 (10th Cir. 1985). Thus, Petitioner has failed to establish the invalidity of the search warrant in this case.

Under these circumstances, the Court concludes that this issue is without merit.

D. Ineffective Assistance of Counsel

Petitioner argues that he received ineffective assistance of counsel on the grounds that trial counsel failed to convey to the state and/or federal authorities his acceptance of an offer, allegedly made in 1999, to assist the Government's efforts to locate "porn" sites on the Internet, apparently in exchange for a reduced sentence.

In order to prevail on an ineffective assistance of counsel claim, the burden is on the Petitioner to show: (1) trial counsel's performance was not within the range of competence demanded of attorneys in criminal cases; and (2) actual prejudice resulted from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland*, 104 S.Ct. at 2052; *Ludwig v. United States*, 162 F.3d 456, 458 (6th Cir. 1998). In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at 2065.

In order to show actual prejudice in the guilty plea context, the Petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 47 U.S. 52, 106 S.Ct. 366, 369-70, 88 L.Ed.2d 203 (1985). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 104 S.Ct. at 2052.

Cf. United States v. Dominguez Benitez, 2004 WL 1300161 (U.S. Sup. Ct. June 14, 2004) (To obtain reversal on the ground that the district court committed plain error under Federal Rule of Criminal Procedure 11, the defendant must show a reasonable probability that, but for the error, he would not have entered the plea; reasonable probability of a different result is a probability sufficient to undermine confidence in the outcome of the proceeding).

In its Response, the Government contends that no such offer as described by Petitioner was ever extended to him. The Government has filed an affidavit of Petitioner's trial counsel, Ernest W. Williams, in which Mr. Williams describes the negotiations as follows:

> . . . My recollection is that I approached [AUSA] Ms. Goggin with Mr. Brush attempting to use the internet for Mr. Brush to attempt to locate pedophiles in order to benefit Mr. Brush for any proposed Federal prosecution. It is my recollection that the Federal government was not interested in this proposal and Mr. Brush was informed of this at the Riverbend Maximum Security State Prison and he was informed of this in the presence of Mr. Robbie Beal. There never was an agreement with the Government in this regards and there never was a contract with the Government regarding that Mr. Brush could work for the Government. Any communications consisted of merely conversations with myself and Mr. Brush and Mr. Beal or myself and the Government. That was the extent of any agreement. . . . Once Mr. Brush was indicted, there were lengthy negotiations between myself and [AUSA] Mr. Jones and concessions were made on both sides with us dismissing our Motion to Suppress.

(Affidavit of Ernest W. Williams (Docket No. 7)).

That no such "agreement" existed is also supported by the plea agreement that the Petitioner actually entered into with the Government. The signed agreement (Docket No. 46 in Case No. 3:02-00022) states at Paragraph 7 that "No officer or agent of any branch of government (federal, state or local), nor any other person, has told me what sentence I will receive. If there are any agreements between myself and my lawyer and the prosecution concerning my plea they are fully set forth in paragraph (10) below." Paragraph 10 of the agreement incorporates a letter, signed by the prosecutor, the Petitioner and his attorney, which states at Paragraph i: "No additional promises, agreements or conditions have been entered into other than those set forth in this letter and none will be entered into unless in writing and signed by all parties." (*Id.*)

Based on this record, the Court is not persuaded that counsel was deficient as Petitioner has failed to establish that the Government made the offer he describes, or that trial counsel failed to convey acceptance of the alleged offer. Furthermore, the Court is not persuaded that Petitioner has established actual prejudice as he voluntarily entered into a plea agreement in this case that did not contain the offer he now alleges the Government made to him. Under these circumstances, the Court concludes that Petitioner's ineffective assistance of counsel claim is without merit.

E. Speedy Trial

In his Motion To Dismiss, Petitioner argues that the delay between his arrest on state charges on August 12,

1998, and the filing of the federal indictment in the underlying criminal case on February 7, 2002, violates his Speedy Trial rights under the Sixth Amendment.

As the Sixth Amendment speedy trial provision applies only after the defendant has been "accused," the Petitioner's claim challenging the pre-accusatory/indictment delay is not cognizable under the Sixth Amendment. *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). The Due Process Clause of the Fifth Amendment, however, would require dismissal of an indictment for pre-indictment delay under certain circumstances. *Id.*

In *United States v. Rogers*, 118 F.3d 466 (6th Cir. 1997), the Sixth Circuit addressed this issue in the context of the Fifth Amendment Due Process Clause, as well as Rule 48(b) of the Federal Rules of Criminal Procedure.[2] To prove a constitutional violation for pre-indictment delay, the *Rogers* Court held, the defendant must show that the delay: (1) resulted in substantial prejudice to his right to a fair trial; and (2) was an intentional device by the government to gain a tactical advantage, rather than delay resulting from investigative efforts. 118 F.3d at 474-76. *See also Marion*, 92 S.Ct. at 465; *United States v. Wright*, 343 F.3d 849, 859-60 (6th Cir. 2003).

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[2] Rule 48(b) provides:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Applying this test, the *Rogers* Court held that the defendant failed to establish that the death of an alleged co-conspirator resulted in substantial prejudice to his defense. *Id.*

In this case, the Petitioner claims that the prejudice caused by the delay was "[s]tress, intrusive publicity, legal expense, living under a cloud of suspicion, continuing anxiety and even hostility." (Motion, at 3). Emotional stress and financial costs, however, certainly have less of an effect on a defendant's ability to present his defense than the death of a potential witness, which the *Rogers* court found did not constitute substantial prejudice. The Court is not persuaded that the consequences described by the Petitioner rise to the level of substantial prejudice as that term has been applied by the courts. As the Petitioner has failed to satisfy his "heavy burden to prove that pre-indictment delay caused actual prejudice" in his criminal case, *Wright*, 343 F.3d at 860, the Court concludes that Petitioner's speedy trial argument is without merit, and his Motion To Dismiss the Indictment is denied.

IV. Conclusion

The Court concludes that Petitioner is not entitled to relief under 28 U.S.C. § 2255, or through his Motion To Dismiss. Should the Petitioner give timely notice of an appeal from this Memorandum and Order, such notice shall be treated as a application for a certificate of appeal-ability, 28 U.S.C. 2253(c), which will not issue because the Petitioner has failed to make a substantial showing of the denial of a constitutional right. *Castro v. United States*, 310 F.3d 900 (6th Cir. 2002).

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREDERICK JAMES BRUSH	)	
	)	
V.	)	No. 3:04-0141
	)	JUDGE CAMPBELL
UNITED STATES OF AMERICA	)	
	)	

ORDER

Pending before the Court is Petitioner's Motion To Reconsider By A Person In Federal Custody (Docket No. 14). The Court has reviewed the request to reconsider, the Court's previous order and the entire record in the case. Petitioner's Motion To Reconsider is without merit and is DENIED.

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREDERICK JAMES BRUSH	)	
	)	
V.	)	No. 3:04-0141
	)	JUDGE CAMPBELL
UNITED STATES OF AMERICA	)	
	)	

ORDER

Pending before the Court is Petitioner's Amended Motion To Reconsider By A Person In Federal Custody (Docket No. 16). The Court has reviewed the amended request to reconsider, the Court's previous orders and the entire record in the case. Petitioner's Amended Motion To Reconsider is without merit and is DENIED.

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREDERICK JAMES BRUSH Petitioner, V. UNITED STATES OF AMERICA Respondent.	)	No. 3:04-0141 (Crim. No. 3:02-0022) Judge Campbell

ORDER

The Court denied the petitioner's motion for *habeas corpus* relief on June 17, 2004. (Docket Entry No. 13) Presently before the Court is the petitioner's notice of appeal, challenging the judgment in this action. (Docket Entry No. 18)

When a notice of appeal is filed in a *habeas corpus* action brought under 28 U.S.C. § 2255, the district court is required to determine two things: 1) whether it would be appropriate to grant the petitioner a certificate of appealability; 2) whether the petitioner is liable for the appellate filing fee.

As to the first requirement, the petitioner has not filed an application for a certificate of appealability. However, in its Order denying the petitioner's motion for *habeas corpus* relief, the Court stated that a notice of appeal would be treated as *both* a notice of appeal and an application for a certificate of appealability. (Docket Entry No. 13) The Court also stated that "a certificate of appealability

. . . will not issue because the Petitioner has failed to make a substantial showing of the denial of a constitutional right." (Docket Entry No. 13)

A careful review of the record shows that the Court's previous ruling was correct with respect to a certificate of appealability. Therefore, to the extent that the petitioner's notice of appeal is construed as an application for a certificate of appealability, his application is DENIED as moot.

As to the appellate filing fee, the petitioner has submitted neither the two hundred fifty-five dollar ($255.00) appellate filing fee, nor an application to proceed on appeal *in forma pauperis*. However, having already determined that the petitioner failed to make a substantial showing of a denial of a constitutional right, an appeal from the judgment of the Court would not be taken in good faith. Because an appeal from the Court's judgment would not be in good faith, the Court would not certify the petitioner to pursue an appeal in this matter *in forma pauperis*, and any application that he might file to that end would be denied. Accordingly, the petitioner may not proceed on appeal until he pays the full two hundred fifty-five dollar ($255.00) appellate filing fee.

The Clerk is directed to forward a copy of this Order to the Clerk of Court for the Sixth Circuit Court of Appeals.

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

IN THE CRIMINAL/CIRCUIT COURT OF 81 - STEWART COUNTY, TENNESSEE

Case Number: 4-1087-CR-98 Count#: THREE
Judicial District 23RD Judicial Division ONE
Attorney for the State CAREY J. THOMPSON
Counsel for Defendant ROBBIE BEAL
[x] Retained [ ] Appointed [ ] Public Defender

State Of Tennessee
Vs.
Defendant FREDERICK BRUSH
Alias N/A
Date of Birth 12 / 05 / 40 Sex M Race W
SSN 569 - 54 - 9934
From Indictment # 4-1087-CR-98 Warrant # _____
TDOC # _____
TBI Document Control # _____

JUDGMENT

Comes the District Attorney General for the State and the defendant with counsel of record for entry of judgment.
On the 26TH day of APRIL 19 99 the defendant:

[x] pled guilty [ ] Dismissed/Nolle Prosequi
[ ] Remand/Transfer to Other Court
[ ] Retired/Unapprehended Defendant
In fraud:
[ ] guilty [ ] not guilty
[ ] jury verdict [ ] not guilty by reason of insanity
[ ] bench trial [ ] nolo contendere

Indictment: Class (circle one): 1st A (B) C D E [x] Felony [ ] Misdemeanor
Offense AGGRAVATED SEXUAL BATTERY
Amended Charge N/A
Offense date 02 / 14 / 98 County STEWART
Conviction offense AGGRAVATED SEXUAL BATTERY
TCA#: 39-13-504 Sentence imposed date 01 / 29 / 00
Conviction class (circle one): 1st A (B) C D E [x] Felony [ ] Misdemeanor

After considering the evidence, the entire record, and all factors in T.C.A. Title 40, Chapter 35, all of which are incorporated by reference herein, the Court's findings and rulings are:

[x] Sentence Reform Act of 1989
[ ] Mitigated 20% [ ] Mitigated 30%
[ ] Standard 30% Range 1 [ ] Multiple 35% Range 2
[ ] Persistent 45% Range 3 [ ] Career 60%
[x] Violent 100% [ ] Multiple Rapist
[ ] 1st Degree Murder [ ] Child Rapist
[ ] Repeat Violent Offender [ ] School Zone

[ ] Pre 1982 Sentence: _____
[ ] 1st Degree Murder
[ ] Sentence Reform Act of 1982
[ ] 30% Range 1
[ ] 35% Range 2
[ ] 40% Range 2
[ ] 1st Degree Murder

Concurrent with:

Consecutive to:

Sentenced to: Sentence Length:

[x] TDOC 08 Years ____ Months ____ Days ____ Life ____ Life Without Parole ____ Death
Mandatory Minimum Sentence (applicable to T.C.A. 39-17-417, 39-13-513 and 39-13-514 in school zone) _____

[ ] County Jail [ ] Workhouse ____ Years ____ Months ____ Days ____ Hours ____ Week-ends ____ Periodic: (_____)
Mandatory Minimum Sentence (applicable to T.C.A. 39-17-417, 39-13-513 and 39-13-514 in school zone) _____
____ % min. svc. prior to program or work release ____ % min.svc. prior to release (Misdemeanor only)

[ ] Probation ____ Years ____ Months ____ Days Effective _____

[ ] Community Based Alternative ____ Years ____ Months ____ Days ____ Hours ____ Week-ends
Specify _____

Pretrial Jail Credit Period from 08 / 12 / 98 to 04 / 26 / 99 then 04 / 26 / 99 to 01 / 29 / 01 or Number of Days ____

Court Ordered Fees and Fines
$____ Criminal Injury Compensation Fund
$____ Supervision
$____ Child Support (TRSCIF)
$____ Court Cost
$____ FINE ASSESSED
Cost To Be Paid By [X] Defendant [ ] State

Restitution
Victim Name _____
Address _____
Total Amount $ _____ $ _____ per month
[ ] Unpaid Community Service ____ Hours ____ Days ____ Weeks ____ Months

[x] The Defendant having been found guilty is rendered infamous

APPENDIX H

APPENDIX I

Name: Frederick J. Brush
TDOC #: 304390
Place of Confinement: Riverbend Maximum Security Institution
United States District Court: 6th District of Tennessee
Case No. 3:02-00022

V.

United States of America,
Warden, Riverbend Maximum Security Institution

MOTION TO VACATE, SET ASIDE & CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

MOTION

1. Name and location of Court which entered judgment of conviction under attack:
   United States District Court, 6th District.

2. Date of judgment of conviction: February 10, 2003.

3. Length of sentence: 71 months

4. Nature of offense involved(all counts):
   Receipt of Child Pornograpgy [sic]

5. What was your plea?
   (a) Not guilty __
   (b) Guilty X
   (c) Nolo contendere __

6. Kind of trial:
   (a) Jury ___
   (b) Judge only X

7. Did you testify at the trial?
   Yes X No __

8. Did you appeal from the judgment of conviction?
Yes __ No X

9. If you did appeal, answer the following.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court? Yes __ No X

11. If your answer to 10 was "Yes," give the following information:

12. State *consisely* [sic] every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds supporting same.

    (a) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

    (b) Denial of effective assistance of counsel.

13. If any of the grounds in 12A, B, C, or D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petitions or appeal now pending in any court as to the judgment under attack?

    Yes __ No X

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked [sic] herein:

    (a) At the preliminary hearing: Ernest Williams/320 Main St., Franklin, TN 37064

(b) At arraignment or plea: Ernest Williams/320 Main St., Franklin, TN 37064

(c) At trial

(d) At sentencing: Ernest Williams/320 Main St., Franklin, TN 37064

(e) On appeal

(f) In any post-conviction proceeding

(g) On appeal from any adverse ruling in a post-conviction proceeding

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes __ No X

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes __ No X

Wherefore, movant prays that the court grant all relief to which he may be entitled in this proceeding.

/s/ Frederick J. Brush
Frederick J. Brush, pro se

Additional Grounds for Supporting Question # 12

Unconstitutional Search & Seizure

(a) In my 1999 Tennessee State case # 4-1087-CR-98, the crux of the issues at bar rested on the validity of the search warrant. These warrants (and the issuance thereof) were vigorously litigated through a "certified question of law" granted by the State's prosecution, which if affirmed,

would have been fully dispositive of the case. This miscarriage of justice here was that neither the Tennessee Appellate Court or the Tennessee Supreme Court rendered an opinion on the issue most likely due to the "nature of the charge" as suggested by counsel. There is a distinction in Tennessee law between so-called "citizen informants" or bystander witnesses, and "criminal informants" or those from a "criminal milieu". State v. Melson, 638 S.W. 2d 342, 354-55 (Tenn. 1982). Information provided by a citizen/bystander witness known to the affiant to be "reliable" and the prosecution is not required to establish either the credibility of the informant or the reliability of his information. Unfortunately this Tennessee law does not establish a "standard" which qualifies everyone not of the criminal milieu, such as mental capacity, age, physical capabilities (normal eyesight, hearing, etc) or even the capacity to discern right from wrong! Without a valid search warrant, both the State and Federal case would be moot. State v. Usery, No. 02C01-9805-CC-00154 is applicable.

Denial of Effective Assistance of Counsel

(b) When I was arrested on Aug 12, 1998(after calling in a 911 Citizen's Report of a potential bridge collapse) the T.B.I. agent in charge, Agent Joe Craig, was present at the Stewart County Jail when I was booked Five years later the same T.B.I. agent was at my arraignment in Federal Court. This was no coincidence. My counsel at the time was Mr. Ernie Williams who had previously received a plea bargain from the Federal authorities in 1999 that I could assist the government's efforts to locate "porn" sites on the Internet in lieu of sentencing. I advised Mr. Williams that I would accept this plea bargain agreement which then

consummated a contract. For nearly FIVE years the Federal government did not take any adverse action regarding my case, further endorsing the establishment of our mutual contract for me to assist in their efforts to locate illegal activity on the Internet. My Federal Indictment five years later was a frivolous attempt to invalidate the previously offered and accepted plea agreement. Holding case law: US. v. Busse 814 F.2d 760, where trial counsel was ineffective during the plea negotiations by failing to provide defendant with a copy of the plea agreement offered by the U.S.; proper remedy was resentencing in accordance with the plea offer. Also holding was U.S. v. De La Fuente, 8 F.3d 1333 (9th Cir 1993) where trial counsel's failure to contest the government's breach of plea and the government failed to move for a downward departure below the mandatory minimums. Pursuant to U.S.S. G. 15K.1 this constituted ineffective assistance and established cause for procedural default. It is my contention that, during the time of my sentencing, my attorney was suffering from a severe case of mental anguish due to the death of his wife of many years. This personal tragedy, not only caused extensive absence from his work place, but prevented him from aggressively arguing the enforcement of my previously established plea contract or even raising the fact it even existed.

APPENDIX J

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	NO. 3:02-00022
	)	18 U.S.C. § 2252A(a)(5)(B)
v.	)	18 U.S.C. § 2252A(a) (2) (A)
FREDERICK JAMES BRUSH	)	18 U.S.C. § 2

INDICTMENT

(Filed Feb. 7, 2002)

Count One

THE GRAND JURY CHARGES:

On or about the 12th day of August, 1998, in the Middle District of Tennessee, FREDERICK JAMES BRUSH, the defendant herein, knowingly possessed a computer disk that contained three (3) or more images of child pornography, as defined in Title 18, United States Code, Section 2256, which child pornography was produced using materials that had been transported in interstate and foreign commerce.

In violation of Title 18, United States Code, Sections 2 and 2252A(a)(5)(B).

Count Two

THE GRAND JURY FURTHER CHARGES:

Between on or about the 4th day of August, 1998 and on or about the 6th day of August 1998, in the middle District of Tennessee, FREDERICK JAMES BRUSH, the defendant herein, knowingly received child pornography, as defined in Title 18, United States Code, Section 2256, which child pornography had been transported in interstate commerce.

In violation of Title 18, United States Code, Sections 2 and 2252A(a)(2)(A).

A TRUE BILL:

/s/ Suzanne Rippeteau
FOREPERSON

/s/ Richard F. Clippard
RICHARD F. CLIPPARD
UNITED STATES ATTORNEY

APPENDIX K

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

FREDERICK JAMES BRUSH	)	
	)	**NO. 3:04-0141**
v.	)	
UNITED STATES	)	**JUDGE CAMPBELL**
OF AMERICA	)	

MOTION FOR EXTENSION OF TIME IN WHICH TO RESPOND TO MOTION TO VACATE, SET ASIDE AND CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

The United States (the "Government"), through its attorneys, hereby moves for an extension of time of thirty (30) days to respond to the Pro Se Prisoner Motion of Frederick James Brush, pursuant to 28 U.S.C. § 2255.

The Government is in the process of communicating with Mr. Ernest Williams, previous counsel for Mr. Brush, with regard to the allegations of ineffective assistance of counsel by Mr. Brush against Mr. Williams in the present Motion. The Government expects to formulate a response to the present Motion based on these communications.

THEREFORE, the Government requests an additional thirty (30) days to fully explore the matter with Mr. Williams and to respond completely to Mr. Brush's Motion.

Respectfully submitted this 18 day of March 2004.

JAMES K. VINES
UNITED STATES ATTORNEY

BY /s/ S. Delk Kennedy
S. DELK KENNEDY, JR.
Assistant United States Attorney
110 9th Avenue South, A961
Nashville, Tennessee 37203
Phone: (615) 736-5151

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing Motion has been served this 18th day of March 2004, by U.S. Mail, to the following:

Frederick James Brush
#304390
SPR-RIVERBEND MAXIMUM
SECURITY INSTITUTION
7475 Cockrill Bend Industrial Road
Nashville, TN 37209-1048

/s/ S. Delk Kennedy
S. DELK KENNEDY, JR.
Assistant United States Attorney

APPENDIX L

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREDERICK JAMES BRUSH	)	
	)	
V.	)	No. 3:04-0141
	)	JUDGE CAMPBELL
UNITED STATES	)	
OF AMERICA	)	

ORDER

Pending before the Court is the Government's Motion for Extension of Time in Which to Respond to Motion to Vacate, Set Aside and Correct Sentence by a Person in Federal Custody (Docket No. 4). The Motion is GRANTED.

The Motion is GRANTED. The Government shall have until April 23, 2004, to file its response.

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREDERICK JAMES BRUSH	)	
	)	**NO. 3:04-0141**
v.	)	
UNITED STATES	)	**JUDGE CAMPBELL**
OF AMERICA	)	

GOVERNMENT RESPONSE TO MOTION TO VACATE, SET ASIDE AND CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

(Filed Apr. 23, 2004)

The United States (the "Government"), through its attorneys responds to the Motion of Mr. Brush as follows.

Mr. Brush was convicted in this Court of one count of Receipt of Child Pornography as the result of a plea agreement with judgment entered February 10, 2003 (Petition to Enter and Plea of Guilty and Judgement, Record Entries 46 and 47, Middle District of Tennessee Case No. 3:02-00022). He was sentenced to a term of imprisonment of 71 months (Judgment, Record Entry 47, Middle District of Tennessee No. 3:02-00022).

Mr. Brush alleges that he should be granted relief from this Judgment because (a) the underlying conviction at issue in this cause was obtained by use of evidence gained pursuant to an unconstitutional search and seizure and (b) denial of effective assistance of counsel.

Alleged Unconstitutional Search and Seizure

Specifically in this regard Mr. Brush complains that "[i]n my 1999 Tennessee Case #4-1087-CR-98, the crux of the issues at bar rested on the validity of the search warrant . . . This miscarriage of justice here was that neither the Tennessee Appellate Court or the Tennessee Supreme Court rendered an opinion on the issue. . . . Without a valid search warrant both the State and Federal case would be moot" (Motion, Record Entry 1, page 3).

These assertions are factually incorrect. The Tennessee Criminal Court of Appeals did consider the issue. *See State v. Brush,* 2000 WL 378315 (Tn. Crt. Crim. App. 2000) (Copy attached as Exhibit A). In fact that Court specifically held the state case (Stewart County Circuit Court, No 4-1087-CR-98) would not be moot if the search warrant in question was held to be invalid. *Brush* at 2.

Mr. Brush does not complain that this Court failed to consider his Motions to Suppress in the case from which he seeks relief (See Motion to Suppress and Memorandum in Support, Record Entries 16 and 17, 22 and 23, and 27, Middle District of Tennessee No. 3:02-00022). In fact Mr. Brush forwent a hearing on these motions by his entry of a negotiated plea in this Court on July 22, 2002 (See Clerics Resume and Petition to Enter a Plea of Guilty, Record Entries 34 and 46, Middle District of Tennessee No. 3:02-00022 and Affidavit of Ernest W. Williams attached as Exhibit C hereto) (Copy of the Petition to Enter a Plea of Guilty is attached as Exhibit B hereto). Furthermore in his plea agreement Mr. Brush specifically waived in proceeding pursuant to 28 U.S.C. 2255 as is the instant Motion, to waive all claims except those of prosecutorial misconduct and ineffective assistance of counsel (See

Petition to Enter a Plea of Guilty, Record Entry 46, Middle District of Tennessee No. 3:02-00022, paragraph 10 at page 4 and attached letter of June 10, 2002 at paragraph g)(Copy attached hereto as Exhibit B).

Denial of Effective Assistance of Counsel

Mr. Brush's second allegation is that his trial counsel in the underlying case, Ernie Williams, failed to effectuate an alleged plea agreement with the Government which would have resulted in a lesser sentence in the underlying case for Mr. Brush in exchange for Mr. Brush's cooperation with the Government (Motion, Record Entry 1, page 3). The Government's position is that no such offer as Mr. Brush describes was ever extended by the Government, and therefore no such agreement did exist or could have existed.

The plea agreement in the underlying case makes no mention of any agreement as Mr. Brush alleges in his Motion (Petition to Enter a Plea of Guilty, Middle District of Tennessee No.3:02-00022, Record Entry 46). In fact the plea agreement contains two integration clauses reciting that there are no other agreements between Mr. Brush and the Government (Petition to Enter a Plea of Guilty, Middle District of Tennessee No 3:02-00022, Record Entry 46, pages 3 and 4 and paragraphs 7 and 10, attached letter of June 10, 2002 at paragraph i). Once the government enters a plea agreement containing an integration agreement the result should ordinarily be final and immune from collateral attack. *U.S. v Hunt*, 205 F.3d. 931, 935-36 (6th Cir. 2000).

Further, the defendant's trial counsel "Ernie" Ernest W. Williams states under oath, that no such agreement

with the government as Mr. Brush alleges was ever offered (Affidavit of Ernest W. Williams attached hereto as Exhibit C).

Therefore, for the reasons stated above the Motion should be denied.

Respectfully Submitted

JAMES K. VINES
UNITED STATES ATTORNEY

BY /s/ S. Delk Kennedy
S. DELK KENNEDY, JR.
Assistant United States Attorney
110 9th Avenue South, A961
Nashville, Tennessee 37203
Phone: (615) 736-5151

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing has been served this 22 day of April, 2004, by U.S. Mail, to the following:

Frederick James Brush
#304390
SPR-RIVERBEND MAXIMUM
SECURITY INSTITUTION
7475 Cockrill Bend Industrial Road
Nashville, TN 37209-1048

/s/ S. Delk Kennedy
S. DELK KENNEDY, JR.
Assistant United States Attorney

2000 WL 378315 (Tenn.Crim.App.)

Court of Criminal Appeals of Tennessee, at Nashville.

STATE of Tennessee,

v.

Frederick James **BRUSH.**

No. M1999-00622-CCA-R3-CD.

April 14, 2000.

Direct Appeal from the Circuit Court for Stewart County, No. 4-1087-CR-98; Robert E. Burch, Trial Judge.

Ernest W. Williams, Franklin, TN, for the appellant, Frederick James Brush.

Paul G. Summers, Attorney General and Reporter, Michael Moore, Solicitor General, Elizabeth T. Ryan, Assistant Attorney General, Dan Mitchum Alsobrooks, District Attorney General, and Robert Wilson, Assistant District Attorney General, for the appellee, State of Tennessee.

HAYES, J., delivered the opinion of the court, in which SMITH, and OGLE, JJ., joined.

OPINION

HAYES.

Following denial of a motion to suppress, the appellant Frederick James Brush, entered a *nolo contendere* plea in the Stewart County Circuit Court to one count of aggravated sexual battery and received a sentence of eight years incarceration. Pursuant to Tenn.R.App.P. 3(b) and Tenn.R.Crim.P. 37(b)(2)(i), the appellant explicitly reserved the right to challenge the admissibility of evidence

seized pursuant to a search of his residence. Specifically, he contends that the affidavit supporting issuance of the search warrant is insufficient to establish probable cause because it fails to establish the reliability of the three year old victim informant. As we find the issue not dispositive, we are without jurisdiction to entertain the appeal. Accordingly, the appeal is dismissed and the case remanded to the trial court.

The appellant, Frederick James Brush, appeals from a judgment of conviction entered by the Circuit Court of Stewart County. On April 26, 1999, the appellant entered a plea of *nolo contendere* to one count of aggravated sexual battery, a class B felony.[1] As provided by the plea agreement, the appellant was sentenced to eight years incarceration in the Tennessee Department of Correction. As a condition of his plea, the appellant, with the consent of the State, reserved the right to appeal, as a certified question of law, the trial court's denial of his motion to suppress the search of his residence. The warrant was issued based solely upon the testimony of a three year old victim informant. On appeal, the appellant challenges the credibility of this or any three year old, arguing that a three year old's reliability should not be measured by the same standard as that of the "typical" citizen informant.

After review of the record, the appeal is dismissed and the case is remanded for further proceedings.

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[1] The appellant was originally charged by indictment of two counts of aggravated rape and one count of aggravated sexual battery. Upon his entry of a *nolo contendere* plea to aggravated sexual battery, the remaining counts of the indictment were dismissed under the terms of the plea agreement.

Background

The facts at the guilty plea hearing established that the appellant and the three year old victim's mother were close acquaintances. On occasion, the mother would leave her daughter in the care of the appellant. One of these occasions occurred in February 1998 and another in July 1998. The mother confirmed that the child was in the appellant's care during these periods of time. In August 1998, the three year old began "telling of a sexual encounter with the [appellant]." Specifically, she related to law enforcement officers:

> she liked pancakes. . . . And, for her to have pancakes at the defendant's house, that she would have to play with his "pee-pee". . . . And, if she did that, then she would get pancakes. The child also told us that when she would take a bath sometimes, that the defendant would come in and take photographs of her in the bathtub.

Based upon the three year old's statements, a search warrant was obtained and as a result of the search of the appellant's residence, officers recovered a video tape filmed in the appellant's bedroom in which the appellant is seen masturbating and touching the three year old victim with his penis.[2] Also seized were other pornographic photographs of the victim and other unidentified children.

Analysis

The appellant, in this appeal, seeks review of the certified questions under the provisions of Tenn.R.Crim.P.

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[2] This proof is the basis of the appellant's conviction for aggravated sexual battery which occurred in February 1998.

37(b)(2)(i). The judgment of conviction specifically reserves the certified question. Accordingly, we proceed to determine whether the questions are properly before this court under subsection (i).

An appeal lies from a guilty plea, pursuant to Rule 37(b)(2)(i), if the final order of judgment contains a statement of the dispositive certified question of law reserved by the defendant, wherein the question is so clearly stated as to identify the scope and the limits of the legal issues reserved. *See State v. Preston,* 759 S.W.2d 647, 650 (Tenn.1988); *see also State v. Pendergrass,* 937 S.W.2d 834 (Tenn.1996). The order must also state that the certified question was expressly reserved as part of the plea agreement, that the State and the trial judge consented to the reservation, and that the State and the trial judge are of the opinion that the question is dispositive of the case.[3] *Preston,* 759 S.W.2d at 650. The record satisfies the requirements of *Preston* and *Patterson.*

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[3] Although the plea agreement and final order of the trial court are not included in the record before this court, we note that the transcript of the guilty plea hearing reflects the trial court's acknowledgment that the guilty plea was conditionally entered reserving a certified question of law regarding the validity of the search warrant based upon the reliability of the three year old informant. Moreover, the final judgment of conviction provides:

> The State of Tennessee and the defendant through counsel wishes to reserve to the Court of Criminal Appeals the following certified question of Law which both declare to be dispositive of this case: That the affidavit in the search warrant failed to establish probable cause in that reliability of the informant had not been established and that the affidavit in the search warrant did not relate an adequate time frame in which the alleged criminal activity occurred.

"An issue is dispositive when this court must either affirm the judgment or reverse and dismiss." *State v. Wilkes*, 684 S.W.2d 663 (Tenn.Crim.App.1984). That is to say that, if we should find the appellant's position correct, there would be no case to prosecute as there would be no proof to convict. We are unable to conclude that the certified questions are dispositive of the case.[4] Although the incriminating evidence resulting from the search of the appellant's house provides material proof of his guilt, the fact remains that the testimony of the victim was still available to establish the appellant's guilt. Considering both the testimony of the victim and her mother, a rational trier of fact could have found the appellant guilty of aggravated sexual battery without the State introducing the evidence seized from the search of the appellant's residence.

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[4] The appellant contends that this court should address, as an issue of first impression, the question of whether a child informant be evaluated for reliability as a criminal informant or as a citizen informant. Although we find the presented questions non-dispositive we would note that this court has on previous occasion addressed the issue of a child informant, concluding that a child informant be evaluated as a citizen informant. *See State v. Tina M. Yeomans and David McCluster Wade, Jr.*, No. 02C01-9810-CC-00312 (Tenn.Crim.App. at Jackson, Oct. 25, 1999) (*for publication*). In so concluding, Judge Riley, writing on behalf of this court, held that, although "the age of the informant is certainly relevant, the mere fact that the citizen was a juvenile . . . does not preclude a finding of reliability." *State v. Tina M. Yeomans and David McCluster Wade, Jr.*, No. 02C01-9810-CC-00312 (citing *Easton v. City of Boulder*, 776 F.2d 1441, 1450 (10th Cir.1985) (permissible to rely upon statements of five year old and three year old children in issuing arrest warrant)). Additionally, the court acknowledged that, even where evidence is not "legally competent in a criminal trial," that same evidence may be used to establish probable cause. *State v. Tina M. Yeomans and David McCluster Wade, Jr.*, No. 02C01-9810-CC-00312 (citing *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741 (1965)).

This court is not at liberty to assume jurisdiction of a matter conferred by agreement of the litigants and the trial court where none is conferred by law. *See Wilkes,* 684 S.W.2d at 667. As we find the certified questions not dispositive of the case, this court has no jurisdiction to entertain this appeal. *See* Tenn.R.Crim.P. 37(b)(2). Furthermore, because the guilty plea was the product of a negotiated plea agreement, the plea agreement is vacated and the case is remanded to the trial court for trial or other appropriate proceedings.

Accordingly, the appeal is dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	**NO. 3:02-00022**
v.	)	**JUDGE CAMPBELL**
FREDERICK JAMES BRUSH	)	

PETITION TO ENTER A PLEA OF GUILTY

(Filed Jul. 22, 2002)

I, Frederick James Brush, Jr., respectfully represent to the court as follows:

(1) My true full name is Frederick James Brush, Jr. I was born on December 5, 1940 and completed sixteen (16) years of school.

(2) My retained lawyer is Ernest W. Williams.

(3) I have received a copy of the indictment before being called upon to plead and have read and discussed it with my lawyer, and believe and feel that I understand every accusation made against me in the indictment.

(4) I have told my lawyer the facts and surrounding circumstances concerning the matters mentioned in the indictment and believe and feel that my lawyer knows enough about my case to render me effective assistance. My lawyer has counseled and advised with me as to the nature and cause of every accusation against me. We have thoroughly discussed the government's case against me and my potential defenses to the government's case. My lawyer has explained to me each element of the crime charged and how the government would offer to prove these elements beyond a reasonable doubt.

(5) I understand that the statutory penalty for the offense(s) with which I am charged on Count 1 is up to two (2) to ten (10) years imprisonment, up to a $250,000.00 fine, a period of supervised release of no more than three (3) years, $N/A of restitution, and a mandatory special assessment of $100.00 per count as provided in 18 U.S.C. §3013. I understand that the statutory penalty for the offense(s) with which I am charged on Count 2 is not less than five (5) years nor more than thirty (30) years imprisonment, up to a $250,000.00 fine, a period of supervised release of no more than five (5) years, $N/A of restitution, and a mandatory special assessment of $100.00 per count as provided in 18 U.S.C. §3013. As to the count(s) to which I am offering to plead guilty, I understand that the statutory penalty for the offense(s) with which I am charged is not less than five (5) years nor more than thirty (30) years imprisonment, up to a $250,000.00 fine, a period of supervised release of no more than five (5) years, $N/A of

restitution, and a mandatory special assessment of $100.00 per count as provided in 18 U.S.C. §3013.

I have been advised that I will be sentenced under the sentencing provisions of the Comprehensive Crime Control Act of 1984, pursuant to guidelines established by the United States Sentencing Commission. I also understand that the Judge shall impose a sentence within the guideline range unless the court finds, and states on the record, any mitigating or aggravating circumstances that were not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. I also understand that, if the court fails to follow the guidelines or improperly applies the guidelines, I have a right to a review of my sentence by the United States Court of Appeals for the Sixth Circuit. I have been advised by my attorney that the guideline range in my case should be from **57 to 71 months in Criminal History Category III. This guideline range is based upon the Federal Sentencing Guidelines 2G2.2 base offense level of 17, convicted under 18 U.S.C. §2 and 2252A(a)(2)(A), add two (2) levels where the Defendant had material that involved a prepubescent minor or a minor under the age of twelve (12) years, add five (5) levels where the Defendant engaged in a pattern of activity involved in the sexual abuse or exploitation of a minor, and add two (2) levels where a computer was used for the transmission of the material or a notice or advertisement of the material, and subtract three (3) levels for acceptance of responsibility. I also understand that the statutory minimum is five (5) years or sixty (60) months.** I realize that this is simply my attorney's estimate and that my guideline range will be calculated by the United States Probation Officer who

prepares the presentence report in my case, subject to challenge by either me or the government with the final guideline calculation based upon the factual and legal findings of the court. These findings are subject to appeal.

I further understand that, as a part of any sentence of imprisonment I receive, I may be sentenced to a mandatory period of supervised release and that, if I violate the terms of that supervised release, upon revocation I could be imprisoned for a term equal to the entire period of supervised release. If I am charged with more than one offense, I understand that the sentencing guidelines take this into consideration and it may result in a longer sentence whether or not I plead guilty to more than one offense. I have been informed that under the present federal sentencing system I will not be subject to parole and I will receive only 54 days good time per year and it will not vest until the end of each year. I further understand that I will be sentenced to a mandatory fine to be calculated through the guidelines unless the Judge finds me indigent and unable to pay any fine. Considered in this fine will be the amount of financial loss to the victim or gain to me as well as the costs of any confinement or probation supervision.

I understand that, should this plea of guilty be accepted, I will be a convicted felon in the eyes of the law for the rest of my life. This means, under present law, that:

(a) I cannot vote in Tennessee; (b) I cannot possess a firearm anywhere; (c) If I am presently on probation or parole, whether state or federal, the fact that I have been convicted may be used to revoke my probation or parole regardless of what sentence I receive on this case; (d) This conviction may be used as one of the necessary convictions

a state would have to prove should they decide to prosecute me for being an habitual criminal. If I were convicted of being a habitual criminal I could be sentenced up to life imprisonment depending on state law; (e) I may have to disclose the fact that I am a convicted felon when applying for employment and such disclosure may result in my not getting some jobs and having difficulty in getting others. If I have been convicted of certain drug offenses, my conviction may result in my losing entitlement to certain federal benefits pursuant to the Anti-Drug Abuse Act of 1988.

(6) I understand that I can plead "NOT GUILTY" to any or all offenses charged against me, and continue to plead "NOT GUILTY," and that if I choose to plead not guilty, the Constitution guarantees me (a) the right to a speedy and public trial by jury; (b) the right not to testify and no implication of guilt would arise by my failure to do so; (c) the right to be presumed innocent until such time, if ever, that the government proves my guilt beyond a reasonable doubt to the satisfaction of a court and jury; (d) the right to see and hear all the witnesses and to cross-examine any witness who may testify against me; (e) the right to use the power and process of the court to compel the production of any evidence, including the attendance of any witnesses, in my favor, and to testify in my own behalf if I choose to do so; (f) the right to have the assistance of counsel in my defense at all stages of the proceedings; (g) if I am convicted at such trial I have the right to appeal with a lawyer to assist me and the appeal will not cost me any money if I am indigent. I understand that if the court accepts my plea that there will be no jury trial and that I will be convicted of the count(s) to which I plead just as if a jury found me guilty of the charge(s) following a trial and that the court may impose sentence upon me

within the limits set forth in the plea agreement stated in paragraph (10) herein.

(7) No officer or agent of any branch of government (federal, state or local), nor any other person, has told me what sentence I will receive. If there are any agreements between myself and my lawyer and the prosecution concerning my plea they are fully set forth in paragraph (10) below. I understand that, even with a plea agreement, no person can bind the Judge to give any particular sentence in my case and that, if the Judge decides to reject the plea agreement set forth in paragraph (10) below, I will be offered the opportunity to withdraw my plea and plead not guilty, if I desire, unless the government has only agreed to recommend a sentence to the court [Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure]. I hope to receive probation or some form of leniency but I am prepared to accept any punishment permitted by law which the judge may see fit to impose. I understand that I am not eligible for a sentence of probation if I receive any sentence of imprisonment or am convicted of a Class A or Class B felony punishable by twenty or more years imprisonment. I understand that, if the judge decides to make a recommendation about where I should serve any incarceration, the recommendation is not a promise or a guarantee, but only a recommendation and is not binding on the Bureau of Prisons which will make the final decision (after I am sentenced) about where I will be incarcerated.

(8) My lawyer has done all that anyone could do to counsel and assist me, and I understand the proceedings in this case against me. My lawyer has done all the investigation and research in this case that I have asked him or her to do and I am satisfied with his or her representation at this point.

(9) Fully understanding my rights to plead "NOT GUILTY" and fully understanding the consequence of my plea of guilty, I wish to plead "GUILTY" and respectfully request the court to accept my plea as follows:

A plea of guilty to violation of Title 18, U.S.C. § 2 and 2252A(a)(2)(A).

(10) This plea is a result of a plea agreement between my lawyer and the prosecution under the provisions of Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure. The plea agreement is as follows:

See attached letter signed by the Assistant United States Attorney Byron M. Jones and the Defendant, Frederick James Brush, Jr. and Attorney for Defendant, Ernest W. Williams.

(11) I offer my plea of "GUILTY" freely and voluntarily and of my own accord; also my lawyer has explained to me, and I feel and believe I understand, the statements set forth in the (indictment/information), and in this petition, and in the "Certificate of Counsel" which is attached to this petition.

(12) I am not under the influence of either drugs or alcohol.

(13) I pray that the court enter my plea of "GUILTY" as set forth in paragraph (9) of this petition, in reliance upon my statements made in this petition.

(14) Recognizing that the court may reserve acceptance of this plea pending the receipt of the pre-sentence report, I hereby waive the provisions of Rule 32, Fed. R. Crim. P. to the extent that such provisions conflict with 18 U.S.C. §3552(d), and agree that the pre-sentence report

may be disclosed to the United States Attorney, my counsel and myself, prior to the sentencing hearing.

Signed by me in open court under the penalties of perjury in the presence of my lawyer, this the 22nd day of July, 2002.

/s/ Frederick James Brush
Frederick James Brush, Jr.,
Defendant

ACKNOWLEDGEMENT OF GOVERNMENT ATTORNEY

The maximum punishment, plea and plea agreement (if any) are accurately stated above.

/s/ Byron M. Jones
Byron M. Jones
Attorney for Government

CERTIFICATE OF COUNSEL

The undersigned, as attorney and counselor for Frederick James Brush Jr. hereby certifies as follows:

(1) I have read and fully explained to Frederick James Brush, Jr. all the accusations against my client in this case;

(2) To the best of my knowledge and belief each statement set forth in the foregoing petition is in all respects accurate and true;

(3) In my opinion the plea of "GUILTY" as offered by my client in paragraph (9) of the foregoing petition, is voluntarily and understandingly made; and I recommend

to the court that the plea of "GUILTY" be accepted and entered as requested in paragraph (9) of the foregoing petition.

Signed by me in open court in the presence of my client this 22nd day of July, 2002.

/s/ Ernest W. Williams
ERNEST W. WILLIAMS

ORDER

Good cause appearing therefore from the foregoing petition of the foregoing named defendant and the certificate of counsel and for all proceedings heretofore had in this case, it is ORDERED that the petition be granted and the defendant's plea of "GUILTY" be accepted and entered as prayed in the petition and as recommended in the certificate of counsel.

DONE in open court this 7th day of Feb, 2003

/s/ Todd Campbell
UNITED STATES DISTRICT JUDGE

[SEAL] **U.S. Department of Justice**

United States Attorney
Middle District of Tennessee

110 9th Avenue South, Suite A-961

Nashville, Tennessee 37203-3870

Telephone (615)736-5151
Fax (615) 736-5323

June 10, 2002

Mr. Ernest W. Williams
Williams & Associates
320 Main Street, Suite 101
Franklin, Tennessee 37064

Re: *United States v. Fredrick James Brush*
Case No. 3:02-00022

Dear Mr. Williams:

This letter confirms the plea agreement which is offered to Mr. Brush by the United States Attorney's Office for the Middle District of Tennessee in *United States v. Fredrick James Brush*. If your client decides to accept this offer, please sign in the spaces provided below. The terms of the agreement are as follows:

a. The defendant agrees to plead guilty to Count Two of the Indictment.

b. The United States will recommend that the defendant receive full credit for "acceptance of responsibility" pursuant to U.S.S.G. Sections 3E1.1(a), provided that the defendant does not engage in future conduct which violates a condition of bond, constitutes obstruction of justice, or otherwise demonstrates a lack of acceptance of responsibility, that the defendant fully and completely

admits to the Court and the Probation Officer his responsibility for this offense, and that no facts presently unknown to the United States surface with regard to defendant's pre-plea conduct, which would be inconsistent with such a reduction.

c. The United States will recommend a sentence of imprisonment in the low end of the applicable guideline range, but not less than minimum term of sixty months required by statute.

d. The defendant shall pay the special assessment of $100.00 prior to the date of sentencing.

e. The defendant is aware that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging this, the defendant knowingly waives the right to appeal any sentence within the maximum provided in the offense level as determined by the court or the manner in which that sentence was determined on the grounds set forth in 18 U.S.C. § 3742 or on any ground whatever, in exchange for the concessions made by the United States in this plea agreement. Such waiver does not apply, however, to claims of prosecutorial misconduct, ineffective assistance of counsel, or if the Court departs upward.

f. In exchange for the agreement made by the defendant in waiving a sentence appeal, the United States of America similarly waives its right to appeal the sentence under 18 U.S.C. § 3742, except if the Court departs downward.

g. The defendant also knowingly waives the right to challenge the sentence imposed and the manner in which it was determined in any collateral attack, including, but

not limited to, a motion brought pursuant to 28 U.S.C. § 2255, except for claims of ineffective assistance of counsel or prosecutorial misconduct.

h. All parties understand that any recommendation by the United States can in no way bind the Court or the Bureau of Prisons. It is further understood by all parties that this agreement shall not preclude the United States from assuring that the record of this case and all information provided to the Court by any source is factually accurate and complete, nor from answering factual requests made by the Court, in order that the Court can make its own independent determination.

i. No additional promises, agreements or conditions have been entered into other than those set forth in this letter and none will be entered into unless in writing and signed by all parties.

If you fully accept each and every term and condition of this Agreement, please sign and have your client sign the original and return it to me.

Sincerely,

JAMES K. VINES
United States Attorney for the
Middle District of Tennessee

BY: /s/ Byron M. Jones
BYRON M. JONES
Assistant U. S. Attorney

I have read this agreement and carefully reviewed every part of it with my attorney. I understand it, and I voluntarily agree to it. Further I have consulted with my attorney and fully understand my rights with respect to

the provisions of the Sentencing Guidelines which may apply to my case. No other promises or inducements have been made to me, other than those contained in this letter. In addition, no one has threatened or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.

/s/ Frederick James Brush 7/2/02
Frederick James Brush [JR.] Date

/s/ [Illegible] 7/2/02
Ernest W. Williams Date
Attorney for Defendant

cc: Special Agent Wallace Drueck, IRS CID
Special Agent Joseph Craig, TBI

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA,)
)
vs.) **No.: 3:02-00022**
)
FREDERICK JAMES BRUSH,)

AFFIDAVIT OF ERNEST W. WILLIAMS

STATE OF TENNESSEE)
)
COUNTY OF WILLIAMSON)

Ernest W. Williams, being first duly sworn, hereby gives his Affidavit as follows:

1. I am an attorney licensed and practicing in the State of Tennessee;

2. I began representation of Mr. Brush in the latter part of 1998 along with a gentleman in my office at that time, Mr. Robbie Beal. We represented him in the original underlying State charge that originated in Stewart County, Tennessee. Sometime towards the resolution of that case, we discovered that the Federal authorities were investigating Mr. Brush in regards to the child pornography. I believe the Assistant United States Attorney at the time that was handling that investigation was Ms. Wendy Goggin. During our discussions with Mr. Brush, the issue of him trying to help himself by cooperating with the Federal authorities did come up. My recollection is that I approached Ms. Goggin with Mr. Brush attempting to use the internet for Mr. Brush to attempt to locate pedophiles in order to benefit Mr. Brush for any proposed Federal prosecution. It is my recollection that the Federal government was not interested in this proposal and Mr. Brush was informed of this at the Riverbend Maximum Security State Prison and he was informed of this in the presence of Mr. Robbie Beal. There never was an agreement with the Government in this regards and there never was a contract with the Government regarding that Mr. Brush would work for the Government. Any communications consisted of merely conversations with myself and Mr. Brush and Mr. Beal or myself and the Government. That was the extent of any agreement.

I do not know what caused the delay in prosecution by the Federal authorities, however, I do know that Ms. Wendy Goggin was later transferred to the Department of Justice in Washington, D.C. and the Assistant United States Attorney, Byron Jones, was assigned this case. Once

Mr. Brush was indicted, there were lengthy negotiations between myself and Mr. Jones and concessions were made on both sides with us dismissing our Motion to Suppress.

FURTHER, the Affiant saith not.

/s/ Ernest W. Williams
ERNEST W. WILLIAMS

Sworn to and subscribed before me on this the 21st day of April, 2004.

/s/ Linda Douthit
Notary Public

My Commission Expires: 3/28/06.
[Notary Stamp]

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREDERICK JAMES BRUSH	)	
	)	3:04-0141
v.	)	JUDGE CAMPBELL
UNITED STATES OF AMERICA	)	

NOTICE OF INTENT

(Filed May 3, 2004)

Please be advised that the Plantiff received the GOVERNMENT RESPONSE TO VACATE, SET ASIDE AND CORRECT A SENTENCE BY A PERSON IN FEDERAL CUSTODY MOTION on April 28, 2004 and will be filing a response to same within 10 days.

Respectfully submitted this 30th day of April, 2004.

/s/ Frederick J. Brush
Frederick J. Brush
TDOC #: 304390
Riverbend Maximum Security Institution
7475 Cockrill Bend Blvd
Nashville, TN. 37209-1048
Case No. 3:04-0141

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served this 30th day of April 2004 by U.S. Mail to the following:

S. Delk Kennedy, Jr.
Assistant U.S. Attorney
110 9th Avenue South, A961
Nashville, TN. 37203

/s/ Frederick J. Brush
Frederick J. Brush, #304390
R.M.S.I. Unit 6, A-206
7475 Cockrill Bend Blvd.
Nashville, Tn. 37209-1048

pc: S. Delk Kennedy, Jr.
file

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREDERICK JAMES BRUSH	)	
	)	3:04-0141
v.	)	
	)	JUDGE CAMPBELL
UNITED STATES OF AMERICA	)	

REBUTTAL TO GOVERNMENT RESPONSE TO MOTION TO VACATE, SET ASIDE AND CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

(Filed May 12, 2004)

The following response is in rebuttal to the government's response to the Court's request to answer, plead or otherwise respond to the Plaintiff's Motion under 28 U.S.C § 2255 to Vacate, set aside a sentence.

Unconstitutional Search and Seizure

Both the Appellate Court and the Tennessee Supreme Court failed to provide a ruling on the "legality" of the Tennessee Law which defines a "Citizen Source" or "Citizen Witness' without setting up some measure or physical/mental standard to determine the credibility of this witness other than one cannot be of the criminal milieu. Presently ANYONE (not of the criminal milieu) can bear witness against a person and their testimony is considered both credible and reliable in a court of law. Tennessee v. Usery No. 02C01-9805-CC-00154 August 4, 1999: State v. Stevens, 989 S.W. 2d. 290 (TN 1999). In Stevens, officers obtained a search warrant based on information from an

ADULT concerned citizen source. Furthermore, resorting to a traditional Jacumin analysis of veracity or reliability we find no allegation similar to that made in Stevens which would factually indicate the reliability of the information. The veracity prong, therefore, has not been satisfied and the search warrant issued in this case pursuant to which the principal evidence was seized was not supported by probable cause. The court reversed the order of the trial court, overruling the order to suppress. We vacate the Defendant's conviction and remand this case to the trial court for DISMISSAL, of the INDICTMENT based on lack of probable cause to support the search warrant. My counsel should be deemed ineffective since the above issue was not raised to the Court during a hearing on these issues which took place on July 22, 2002.

Denial of Effective Assistance of Counsel

The plea Agreement that I addressed in my motion to Vacate, Set Aside and Correct a Sentence was, in fact, a valid proposal that Mr. Ernest Williams and the government's representative, Ms. Goggin had orchestrated sometime after I was sentenced in State court in April 1999. This fact is corroborated in the sworn affidavit of Mr. Williams dated April 21, 2004. This offer was presented to me by Mr. Williams, asking me if I would agree to such an undertaking. We discussed the logistics of such an operation, such as timing, transportation, etc. In essence, my acceptance to participate in this offer constituted a conclusion of an oral contract between the Government and myself to perform certain personal services in lieu of sentencing, resulting from pending government charges of possession of pornography on my computer. This contract was not brought to the Court's attention, which would

have greatly reduced my sentence to the lowest end of the range and possibly probation. This clearly constituted an instance of ineffective assistance of counsel.

Respectfully submitted this 9th day of May, 2004.

/s/ Frederick J. Brush
Frederick J. Brush
TDOC #: 304390
Riverbend Maximum Security Institution
7475 Cockrill Bend Blvd
Nashville, TN. 37209-1048
Case No. 3:04-0141

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Rebuttal to Government Response to Motion to Vacate, Set Aside, and Correct Sentence by a Person in Federal Custody has been served this 9th day of May 2004 by U.S. Mail to the following:

S. Delk Kennedy, Jr.
Assistant U.S. Attorney
110 9th Avenue South, A961
Nashville, TN. 37203

/s/ Frederick J. Brush
Frederick J. Brush, #304390
R.M.S.I. Unit 6, A-206
7475 Cockrill Bend Blvd.
Nashville, Tn. 37209-1048

pc: S. Delk Kennedy, Jr.
file

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREDERICK JAMES BRUSH	)	
	)	3:04-0141
v.	)	JUDGE CAMPBELL
UNITED STATES OF AMERICA	)	

MOTION TO DISMISS INDICTMENT
BY A PERSON IN FEDERAL CUSTODY

(Filed May 12, 2004)

Comes now, The Plaintiff (Frederick J. Brush), requests that this Court Dismiss the Indictment and all related charges in the case of Frederick J. Brush v. United States of America.

Denial of Right to a Speedy Trial

The right of a speedy trial is as fundamental as any rights secured by the Sixth Amendment of the U.S. Constitution. 414 U.S. 25, 38 L.Ed. 2d 183. Courts should indulge every reasonable presumption against waiver of right to speedy trial and they should not presume acquiescence in the loss of fundamental rights. The right to prompt inquiry into criminal charges is fundamental and duty of charging authority is to provide a prompt trial. Dickey v. Florida 398 U.S. 30. Additionally, deliberate attempt to delay trial in order to hamper the defense should be weighed heavily against the government in determining whether defendant's right has been denied. U.S.C A. Const. Amend. 6. From the time of arrest by the State of Tennessee on

August 12, 1998, where all evidence used both, in the State and Federal indictments was secured, to the date the Federal Indictment was issued on February 7, 2002, a period of over forty-two (42) months had elapsed. Since the computer (which allegedly contained all evidence used in the Federal Indictment) was secured into evidence by the Tennessee Bureau of Investigation on or about August 12, 1998, the Government did not need to investigate any further. The government delay to indict was clearly intentional and purposeful. Attorney Ernest W. Williams stated in his sworn affidavit dated April 21, 2004 that "I do not know what caused the delay by the Federal authorities; however, I do know that Ms. Wendy Goggin was later transferred to the Department of Justice and the Assistant United States Attorney, Byron Jones, was assigned to the case." My other acting attorney, Robbie Beal, wrote in his letter of March 27, 2003, "a primary concern of ours [Beal & Ernie Williams]was that the Federal prosecutors would pursue your case based upon the perceived light sentence that you received out of state court. Ernie immediately moved to prevent this from occurring. I know for a fact that he had several meetings with Assistant United States Attorneys, pleading your case and making sure no one believed that your situation was a priority for further investigation. This is even after Agent [Joe] Craig was making the same rounds pleading for an Assistant U.S. Attorney to present this matter to the Federal Grand Juries. I am convinced the only reason your matter was ultimately presented was because of the *Candy Man* cases, coming through the system and yours hitching to that as a matter of convenience." There is overwhelming agreement in court rulings that once the government has assembled sufficient evidence to prove beyond a reasonable doubt, it should be constitutionally required to file charges

promptly, even if its investigation of the entire criminal transaction is not complete. In Barker v. Wingo, 92 SCt. 2182 the Court came up with four factors in determining whether a particular defendant had been deprived of his right [to a speedy trial]. They are: #1 Length of Delay, #2 the reason for the delay, #3 the defendant's assertion of his right, and #4 prejudice to the defendant. In the Case of Frederick J. Brush v. U.S., the results are as follows:

#1 Length of Delay: Date of Arrest/Evidence seized
Aug 12, 1998

Date of Federal Indictment:
Feb 07, 2002

Total Delay
42 Months

After the Government assembled all the evidence on which it expected to establish the respondent's guilt, it waited more than 42 months to seek an indictment. It may reasonably be inferred that the prosecutor was merely busy with other matters that he considered more important than this case.

#2 Reason for Delay: There is no valid reason for any delay.

#3 Assertion of right: Post conviction Claim of Denial to Right of a Speedy Trial to Middle District Court.

#4 Prejudice to Defendant: Stress, intrusive publicity, legal expense, living under a cloud of suspicion, continuing anxiety and even hostility.

Justice Stevens in summing up his opinion regarding the preindictment delay case of U.S. v. Lovasco, 97 S.Ct. 2044

stated that "unless we are able to conclude that the Constitution imposes no constraints on the prosecutor's power to postpone the filing of formal charges to suit his own convenience, I believe we must affirm the judgment of the Court of Appeals[which dismissed all counts of the Indictment]. A contrary position "can be tenable only if one assumes the constitutional right to a fair hearing includes no right whatsoever to a prompt hearing." As applied to Brush v. U.S., in which the respondent queeried his attorneys on numerous occasions whether he was to be indicted, in which the delay caused substantial prejudice to the respondent and in which the government had no justification for the delay, the right for speedy justice should be honored. Marion also holds that the Fed. Rule of Crim. Proc. 48(b), permits courts to dismiss indictments due to preindictment delay in post arrest situations. U.S. v. Marion, 404 U.S. 307. Justice Powell in delivering the opinion of the Court on the case of Margo v. Wingo, 404 U.S. 514, stated that "The amorphous quality of the right [to a speedy trial] also leads to the unsatisfactory severe remedy of dismissal of the indictment when the right has been deprived. **Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only remedy.**"

Therefore, the Plaintiff would request that the Indictment and all related charges in this matter be dismissed.

Respectfully submitted this 9th day of May, 2004.

/s/ Frederick J. Brush
Frederick J. Brush
TDOC #: 304390
Riverbend Maximum Security Institution
7475 Cockrill Bend Blvd
Nashville, TN. 37209-1048
Case No. 3:04-0141

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing motion to dismiss indictment by a person in federal custody has been served this 9th day of May 2004 by U.S. Mail to the following:

S. Delk Kennedy, Jr.
Assistant U.S. Attorney
110 9th Avenue South, A961
Nashville, TN. 37203

/s/ Frederick J. Brush
Frederick J. Brush, #304390
R.M.S.I. Unit 6, A-206
7475 Cockrill Bend Blvd.
Nashville Tn. 37209-1048

pc: S. Delk Kennedy, Jr.
file

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREDERICK JAMES BRUSH	)	
	)	NO. 3:04-0141
v.	)	JUDGE CAMPBELL
UNITED STATES OF AMERICA	)	

MOTION TO RECONSIDER
BY A PERSON IN FEDERAL CUSTODY

Comes now, The Plaintiff (Frederick J. Brush), requests that this Court Reconsider Dismissing the Indictment and all related charges in the case of *Frederick J. Brush v. United States of America.* In support of this motion, the Plaintiff would show the following facts:

The Court erred in its decision to deny motion to dismiss indictment based solely on Petitioner's failure to show substantial prejudice was not satisfied in regard to substantial and deliberate Pre-Indictment delay by the government. In concluding that the Petitioner's Pre-Indictment Delay argument was without merit, the Court heavily relied *United States v. Rogers*, 119 F.3d 466 (6th Cir. 1997) which addressed this issue in the context of the Fifth Amendment Due Process Clause as well as Rule 48b of the Federal Rules of Criminal Procedure. To prove a constitutional violation for pre-indictment delay, the *Rogers* court held, that the defendant must show that the delay: (1) resulted in substantial prejudice to his right to a fair trial; and (2) was an intentional device by the government to gain a tactical advantage, rather than delay resulting from investigative efforts., 118 F.3d at 474-76.

In regard to the test by the *Rogers* court, the United States Supreme Court held that an affirmative demonstration of "prejudice is *not* the *sole touchstone* for proving a denial of a constitutional right to speedy trial and that denial of defendant's claim on ground that a showing of prejudice to his defense at trial was *essential* to establish a federal speedy trial claim and that defendant had not suffered such prejudice since he had been afforded a preliminary hearing and allowed to subpoena witnesses was *fundamental error.* The proper reading of *Barker v. Wingo* 407 U.S. 514, 92 S.Ct. 2182 *expressly rejected* the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial. In Barker v. Wingo the approach they accepted was a *balancing test,* in which the conduct of both the prosecution and the defendant were weighed. A *balancing test* necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which *courts should assess* in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify *four* such factors: (1)Length, of the Delay, (2) the reason for the delay, (3) the defendant's assertion of his right and (4) prejudice to the defendant. [In *Dickey*, 398 U.S., at 48, 90 S. Ct., at 1594 Mr. Justice Brennan identified three factors for consideration: (1) the source of the delay, (2) the reasons for it and (3) whether the delay prejudiced the interests protected by the right. He thought the length of the delay was relevant primarily for the reasons for the delay and its prejudicial effects.

In relying on the *Rogers* case, the *balancing test,* which the U.S. Supreme Court compelled the courts to assess, was incomplete, since only two(2) factors were used [in *Rogers*]

and only one of those factors was used by this Court (Factor # 1), eliminating any possibility of a *balanced test.* That factor (prejudice of the delay resulting in substantial prejudice to his right to a fair trial) related the prejudice caused to the Respondent from (Stress, intrusive publicity, legal expense, living under a cloud of suspicion, continuing anxiety and even hostility) [summed up by the Court as "emotional stress and finan[illegible]l costs"] to prejudice caused to *Rogers* by the death of a potential witness, [Miller] which the *Rogers* court did <u>not</u> constitute as substantial prejudice. This comparison by the Court is wholly without merit since the *Roger's* court stated that "it is not clear that the deceased Miller would have testified, especially because he invoked his Fifth Amendment right in declining to testify before the grand jury. Moreover, if Miller did testify that he was not involved in any wrongdoing relating to the Banking Bill and that the whole thing was a joke, it is unlikely that his testimony would have effected the outcome of the trial." The prejudice inflicted to the Respondent, who was incarcerated in a Maximum Security Prison the entire period of 42 months before the indictment was issued, was very real and quite substantial. In regard to the second prong of the Roger's test (which was not addressed by the court) and that being . . . was the pre-indictment delay an intentional device by the government to gain a tactical advantage, rather than delay resulting from investigative efforts. In the *Roger's* case the government asserts that the development of a thorough and fair investigation of the case caused the delay in obtaining the indictment. It is firmly established just as in *US. v. Lovasco*, 97 S.Ct. 2044, 431 U.S. 783 that *four* revelant propositions were established. They are: (1) this was a routine investigation; (2) after the government assembled all the evidence on which it expected to establish the

Plaintiff's guilt, it waited more than forty-two (42) months to seek an indictment; (3) the delay was substantial, deliberate and prejudicial to the Plaintiff's defense and (4) no reason whatsoever explains the delay.

There is no doubt that the delay by the government was substantial, deliberate and should be weighted heavily against the government. The prejudice induced to the Plaintiff over this nearly four year period was enormous. Being incarcerated in a Maximum Security Prison, living under a cloud of anxiety, suspicion and often hostility produced an unimaginable degree of stress and tension and worry. The Plaintiff's reaction to all the prejudice he had been subjected to *and* being ambushed by the government after forty-two months of stress, anxiety and anticipation culminated in an emotional outpouring before the Court during his sentencing never before experienced in his lifetime.

Conclusion

In conclusion, the Plaintiff would request for the reasons stated herein and in the interest of justice that this Honorable Court reconsider its dismissal of the indictment and all related charges in this case.

Respectfully submitted this 27th day of June, 2004.

/s/ Frederick J. Brush
Frederick J. Brush
TDOC #: 304390
Riverbed Maximum Security Institution
7475 Cockrill Bend Blvd
Nashville, TN. 37209-1048
Case No. 3:04-0141

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing motion to reconsider by a person in federal custody has been served this 27th day of June 2004 by U.S. Mail to the following:

S. Delk Kennedy, Jr.
Assistant U.S. Attorney
110 9th Avenue South, A961
Nashville, TN. 37203

Frederick J. Brush
Frederick J. Brush, # 04390
R.M.S.I. Unit 6, A-206
7475 Cockrill Bend Blvd.
Nashville, Tn. 37209-1048

pc: S. Delk Kennedy, Jr.
file

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREDERICK JAMES BRUSH	)	
	)	3:04-0141
v.	)	JUDGE CAMPBELL
UNITED STATES OF AMERICA	)	

AMENDED MOTION TO RECONSIDER
BY A PERSON IN FEDERAL CUSTODY

Comes now, The Plaintiff (Frederick J. Brush), requests that this Court Reconsider Dismissing the Indictment and all related charges in the case of *Frederick) Brush v. United States of America.* In support of this motion, the Plaintiff would show the following facts:

The Court erred in its decision to deny motion to dismiss indictment based solely on Petitioner's failure to show substantial prejudice was not satisfied in regard to substantial and deliberate Pre-Indictment delay by the government. In concluding that the Petitioner's Pre-Indictment Delay argument was without merit, the Court heavily relied *United States v. Rogers*, 119 F.3d 466 (6th Cir. 1997) which addressed this issue in the context of the Fifth Amendment Due Process Clause as well as Rule 48b of the Federal Rules of Criminal Procedure. To prove a constitutional violation for pre-indictment delay, the *Rogers* court held, that the defendant must show that the delay: (1) resulted in substantial prejudice to his right to a fair trial; and (2) was an intentional device by the government to gain a tactical advantage, rather than delay resulting from investigative efforts., 118 F.3d at 474-76.

In reg[illegible] to the test by the *Rogers* court, the United States Supre[illegible] Court held that an affirmative demonstration of "prejudice is *not* the *sole touchstone* for proving a denial of a constitutional right to speedy trial and that denial of defendant's claim on ground that a showing of prejudice to his defense at trial was *essential* to establish a federal speedy trial claim and that defendant had not suffered such prejudice since he had been afforded a preliminary hearing and allowed to subpoena witnesses was *fundamental error.* The proper reading of *Barker v. Wingo* 407 U.S. 514, 92 S.Ct. 2182 *expressly rejected* the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial. In Barker v. Wingo the approach they accepted was a *balancing test*, in which the conduct of both the prosecution and the defendant were weighed. A *balancing test* necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which *courts should assess* in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify *four* such factors: (1) Length, of the Delay, (2) the reason for the delay, (3) the defendant's assertion of his right and (4) prejudice to the defendant. [In *Dickey*, 398 U.S., at 48, 90 S. Ct., at 1594 Mr. Justice Brennan identified three factors for consideration: (1) the source of the delay, (2) the reasons for it and (3) whether the delay prejudiced the interests protected by the right. He thought the length of the delay was relevant primarily for the reasons for the delay and its prejudicial effects.

In relying on the *Rogers* case, the *balancing test*, which the U.S. Supreme Court compelled the courts to assess, was incomplete, since only two(2) factors were used [in *Rogers*]

and only one of those factors was used by this Court (Factor # 1), eliminating any possibility of a *balanced test*. That factor (prejudice of the delay resulting in substantial prejudice to his right to a fair trial) related the prejudice caused to the Respondent from (Stress, intrusive publicity, legal expense, living under a cloud of suspicion, continuing anxiety and even hostility)[summed up by the Court as "emotional stress and financial costs"] to prejudice caused to *Rogers* by the death of a potential witness, [Miller] which the *Rogers* court did *not* constitute as substantial prejudice. This comparison by the Court is wholly without merit since the *Roger's* court stated that "it is not clear that the deceased Miller would have testified, especially because he invoked his Fifth Amendment right in declining to testify before the grand jury. Moreover, if Miller did testify that he was not involved in any wrongdoing relating to the Banking Bill and that the whole thing was a joke, it is unlikely that his testimony would have effected the outcome of the trial." The prejudice inflicted to the Respondent, who was incarcerated in a Maximum Security Prison the entire period of 42 months before the indictment was issued, was very real and quite substantial. In regard to the second prong of the Roger's test (which was not addressed by the court) and that being . . . was the pre-indictment delay an intentional device by the government to gain a tactical advantage, rather than delay resulting from investigative efforts. In the *Roger's* case the government asserts that the development of a thorough and fair investigation of the case caused the delay in obtaining the indictment. It is firmly established just as in *U.S. v. Lovasco*, 97 S.Ct. 2044, 431 U.S. 783 that *four* revelant propositions were established. They are: (1) this was a routine investigation; (2) after the government assembled all the evidence on which it expected to establish the

Plaintiff's guilt, it waited more than forty-two (42) months to seek an indictment; (3) the delay was substantial, deliberate and prejudicial to the Plaintiff's defense and (4) no reason whatsoever explains the delay.

There is no doubt that the delay by the government was substantial, deliberate and should be weighted heavily against the government. The prejudice induced to the Plaintiff over this nearly four year period was enormous. Being incarcerated in a Maximum Security Prison, living under a cloud of anxiety, suspicion and often hostility produced an unimaginable degree of stress and tension and worry. The Plaintiff's reaction to all the prejudice he had been subjected to and being ambushed by the government after forty-two months of stress, anxiety and anticipation culminated in an emotional outpouring before the Court during his sentencing never before experienced in his lifetime.

Since the government used the delay period to attack the defendant from ambush, by and through an inferred promise to cease prosecution, for defendant's cooperation with government. However, once defendant cooperated with government, the government was not forthcoming with their side of the contract, thus there is a predisposition that wherein the government has not met its burden, substantial prejudice denial of due process and constitutional rights attaches to petitioner. Therefore, the ruling of the Court is unreasonable; also due to the evidence presented in this case the ruling is unreasonable, as the evidence states a valid claim for Habeas Corpus relief.

Conclusion

In conclusion, the Plaintiff would request for the reasons stated herein and in the interest of justice that this Honorable Court reconsider its dismissal of the indictment and all related charges in this case.

Respectfully submitted this, 8th day of July, 2004.

/s/ Frederick J. Brush
Frederick J. Brush
TDOC #: 304390
Riverbend Maximum
Security Institution
7475 Cockrill Bend Blvd
Nashville, TN. 37209-1048
Case No. 3:04-0141

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *amended* motion to reconsider by a person in federal custody has been served this 8th day of July 2004 by U.S. Mail to the following:

S. Delk Kennedy, Jr.
Assistant U.S. Attorney
110 9th Avenue South, A961
Nashville, TN. 37203

Frederick J. Brush
Frederick J. Brush, # 304390
R.M.S.I. Unit 6, A-206
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Nashville, Tn. 37209-1048

pc: S. Delk Kennedy, Jr.
file

APPENDIX S

IN THE UNITED STATES DISTRICT COURT
FOR THE SIXTH CIRCUIT

FREDERICK JAMES BRUSH	)	
	)	
v.	)	3:04-0141
	)	
UNITED STATES OF AMERICA	)	

APPEAL OF DENIAL OF MOTION TO RECONSIDER AND RESPONSE TO UNITED STATES FEDERAL DISTRICT COURT'S ORDER

(Filed Aug. 12, 2004)

Comes now the Plaintiff, Frederick J. Brush, and appeals the United States District Court's denial of motion to reconsider granting habeas corpus relief and denial of appeal in the case of *Frederick J. Brush v. United States of America.* In support of this motion, the Plaintiff would show the following history of the case and related facts:

A. HISTORY OF CASE

1. The entire recorded History of this case is attached hereto as Exhibit "A".

B. DENIAL OF DISMISSAL OF INDICTMENT

1. The Court erred in its decision to deny motion to dismiss indictment based solely on Petitioners' failure to show substantial prejudice which was not satisfied in regard to substantial and deliberate Pre-Indictment delay by the government.

a. In concluding that the Petitioners' Pre-Indictment Delay argument was without merit, the Court solely relied upon *United States v.*

Rogers, 119 F.3d 466 (6th Cir. 1997) which addressed this issue in the context of the Fifth Amendment Due Process Clause, as well as Rule 48b of the Federal Rules of Criminal Procedure. To prove a constitutional violation for pre-indictment delay, the *Rogers* court held that the defendant must show that the delay: (1) resulted in substantial prejudice to his right to a fair trial and; (2) was an intentional device by the government to gain a tactical advantage rather than delay resulting from investigative efforts. 118 F.3d at 474-76.

b. In regard to the test by the *Rogers* Court, the United States Supreme Court held that an affirmative demonstration of "prejudice is not the *sole touchstone* for proving a denial of a constitutional right to speedy trial and that denial of defendants claim on ground that a showing of prejudice to his defense at trial was *essential* to establish a Federal Speedy Trial claim and that defendant had not suffered such prejudice since he had been afforded a preliminary hearing and allowed to subpoena witnesses was *fundamental error.*

c. The proper reading of *Barker v. Wingo* 407 U.S. 514, 92 S.Ct. 2182 *expressly rejected* the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial. In Barker v. Wingo the approach they accepted was a *balancing test*, in which the conduct of both the prosecution and the defendant were weighed. *A balancing test* necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which *courts should assess* in determining whether a particular defendant has been deprived of his

> right. Though some might express them in different ways, we identify *four* such factors: (1) Length, of the delay, (2) the reason for the delay, (3) the defendant. [In *Dickey*, 398 U.S., at 48, 90 S. Ct., at 1594 Mr. Justice Brennan identified three factors for consideration: (1) the source of the delay, (2) the reasons for it and (3) whether the delay prejudiced the interests protected by the right. He thought the length of the delay was relevant primarily for the reasons for the delay and its prejudicial effects.

In relying on the *Rogers* case, the *balancing test*, which the U.S. Supreme Court compelled the courts to assess, was incomplete, since only two(2) factors were used [in *Rogers*] and only one of those factors was used by this Court (Factor # 1), eliminating any possibility of a *balanced test.* That factor (prejudice of the delay resulting in substantial prejudice to his right to a fair trial) related the prejudice caused to the Respondent from (Stress, intrusive publicity, legal expense, living under a cloud of suspicion, continuing anxiety and even hostility) [summed up by the Court as "emotional stress and financial costs"] to prejudice caused to *Rogers* by the death of a potential witness, [Miller] which the *Rogers* court did *not* constitute as substantial prejudice. This comparison by the Court is wholly without merit since the *Roger's* court stated that "it is not clear that the deceased Miller would have testified, especially because he invoked his Fifth Amendment right in declining to testify before the grand jury. Moreover, if Miller did testify that he was not involved in any wrongdoing relating to the Banking Bill and that the whole thing was a joke, it is unlikely that his testimony would have effected the outcome of the trial." The prejudice inflicted to the Respondent, who was incarcerated in a Maximum Security

Prison the entire period of 42 months before the indictment was issued, was very real and quite substantial.

> In regard to the Second prong of the Rogers test (which was not addressed by the court) and that being . . . "was the pre-indictment delay an intentional device by the government to gain a tactical advantage, rather than delay resulting from investigative efforts." In the *Rogers* case the government asserts that the development of a thorough and fair investigation of the case caused the delay in obtaining the indictment. It is firmly established just as in *US. v. Lovasco*, 97 S.Ct. 2044, 431 U.S. 783 that *four* relevant propositions were established. They are: (1) this was a routine investigation; (2) after the government assembled all the evidence on which it expected to establish the Plaintiffs guilt, it waited more than forty-two (42) months to seek an indictment; (3) the delay was substantial, deliberate and prejudicial to the Plaintiffs defense; and (4) no reason whatsoever explains the delay.
>
> There is no doubt that the delay by the government was substantial, deliberate and should be weighed heavily against the government. The prejudice induced to the Plaintiff over this *nearly* four *year period* was enormous. Being incarcerated in a Maximum Security Prison, living under a cloud of anxiety, suspicion and often hostility, produced an unimaginable degree of stress, tension and worry. The Plaintiffs reaction to all the prejudice he had been subjected to and being ambushed by the government after forty-two months of stress, anxiety and anticipation culminated in an emotional outpouring before the Court during his sentencing never before experienced in his lifetime.

C. ORDER [Exhibit "B"]

1. On August 4, 2004 Judge Campbell issued an ORDER in response to my Notice of Appeal.

2. In the aforementioned ORDER denying the petitioner's motion for *habeas corpus* relief (Docket No. 13), Judge Campbell emphasized "that the COURT stated a notice of appeal would be treated as both a notice of appeal and an application of appealability."

D. RESPONSE TO ORDER

1. The allegations stated in the August 4, 2004 ORDER are totally inaccurate and completely untrue. See Exhibit "B" attached hereto.

2. The original ORDER dated 6/17/04 stated merely "should the Petitioner give timely notice of an appeal . . . such notice shall be treated as an application for a certificate of appealability . . . which will not issue. "This ORDER said nothing about the notice of appeal being treated as both a notice of appeal and an application of appealability."

Conclusion

In conclusion, the Plaintiff would request for the reasons stated herein and in the interest of fairness and justice that this Honorable Court reverse the Federal District Court's decision denying habeas corpus relief and denial of appeal in the case of Frederick *J. Brush v. United States of America* and grant the relief sought in this case.

Respectfully submitted this 9th day of August, 2004.

/s/ Frederick J. Brush
Frederick J. Brush
TDOC #: 304390
Riverbend Maximum
Security Institution
7475 Cockrill Bend Blvd
Nashville, TN. 37209-1048
Case No. 3:04-0141

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing appeal of denial of motion to reconsider and response to United States Federal District Court's ORDER has been served this 9th day of August, 2004 by U.S. Mail to the following:

S. Delk Kennedy, Jr.
Assistant U.S. Attorney
110 9th Avenue South, A961
Nashville, TN. 37203

Frederick J. Brush
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file

APPENDIX T

IN THE UNITED STATES DISTRICT COURT
FOR THE SIXTH CIRCUIT

FREDERICK JAMES BRUSH	)	
	)	
v.	)	3:04-5909
	)	
UNITED STATES OF AMERICA	)	

MOTION TO ISSUE
CERTIFICATE OF APPEALABILITY

(Filed Sep. 07, 2004)

Comes now the Plaintiff, Frederick J. Brush, respectfully requests the COURT issue a Certificate of Appealability.

Respectfully submitted this 2nd day of September, 2004.

/s/ Frederick J. Brush

Frederick J. Brush
TDOC # 304390
Riverbend Maximum
Security Institution
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Nashville, TN. 37209-1048
Case No. 3:04-0141

IN THE UNITED STATES DISTRICT COURT
FOR THE SIXTH CIRCUIT

FREDERICK JAMES BRUSH	)	
	)	
v.	)	3:04-5909
	)	
UNITED STATES OF AMERICA	)	

ADDENDUM

(Filed Sep. 7, 2004)

Comes now the Plaintiff, Frederick J. Brush, and amends the Appeal of Denial of Motion to Reconsider and Response to United States Federal District Court's Order to include the following:

The government used the delay period to attack the defendant from ambush, by and through an inferred promise to cease prosecution, for the defendant's cooperation with government. However, once defendant cooperated with government, the government was not forthcoming with their side of the contract, thus there is a predisposition that wherein the government has not met its burden, **substantial prejudice, denial of due process** and **constitutional rights** attaches to petitioner. Therefore, the ruling of the Court is unreasonable; also due to the evidence presented in this case, the ruling is unreasonable, as the evidence states a valid claim for Habeas Corpus relief.

Respectfully submitted this 2nd day of September, 2004.

/s/ Frederick J. Brush
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Case No. 3:04-014

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